86 - 1022

Supreme Court, U.S.
FILED
DEC 17 1986
JOSEPH F. SPANIOL, JR.
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NO. 86-

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1986

THE GOVERNMENT DEVELOPMENT BANK FOR PUERTO RICO; JOSE RAMON GONZALEZ, INDIVIDUALLY AND AS PRESIDENT OF THE GOVERNMENT DEVELOPMENT BANK FOR PUERTO RICO; JUAN AGOSTO ALICEA, FRANCISCO DE JESUS TORO, ANTONIO J. COLORADO, RUBEN VELEZ LEBRON, GILDO MASSO, EDUARDO ROVIRA AND DIEGO SUAREZ, EACH INDIVIDUALLY AND AS MEMBERS OF THE BOARD OF DIRECTORS OF THE GOVERNMENT DEVELOPMENT BANK FOR PUERTO RICO,

Petitioners,

v.

ZAIDA LYDIA DE CHOUDENS,

Respondent.

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI

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December 18, 1986

PUBLISHING RESOURCES, INC. SAN JUAN, PUERTO RICO

36 pp

QUESTION PRESENTED

May *Branti* v. *Finkel*'s reformulation of the standard of *Elrod* v. *Burns* be interpreted to afford First Amendment protection in employment to an indubitably top policymaking and confidential public official like the Senior Vice President, Area of Finance of the Government Development Bank for Puerto Rico, an agency which acts as the leader of economic growth and development, fiscal agent and financial advisor to the Commonwealth government, solely because her duties, while affecting public policy, involve professional and technical matters of agency administration?

PARTIES* TO THE PROCEEDINGS BELOW.

The respondent herein and the conjugal partnership of Zaida Lydia de Choudens and Miguel A. Marrero were the plaintiffs before the District Court for the District of Puerto Rico and plaintiffs-appellees before the Court of Appeals for the First Circuit. Respondent is the party in interest as to the relief afforded below. Besides the petitioners, there were two other defendants before the District Court, who were defendants-appellants before the Court of Appeals: José Ramón Oyola, the previous President of the Government Development Bank for Puerto Rico, and Manuel García Méndez, a former member of its Board of Directors. Since they were replaced, respectively, by petitioners José Ramón González and Gildo Massó, they are not affected by the preliminary injunction granted by the District Court and affirmed by the Court of Appeals, although they remain as defendants below for purposes of plaintiffs' untried claim for damages.

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* Petitioner, the Government Development Bank for Puerto Rico, has no parent companies, subsidiaries or affiliates that must be listed under Rule 28.1 of the Rules of this Court. Nevertheless, it states that it is a public corporation of the Commonwealth of Puerto Rico created by Act No. 17 of September 23, 1948, 7 L.P.R.A. Sec. 551 et seq.; that it has six wholly-owned subsidiaries created by Resolution of its Board of Directors, to wit, the Puerto Rico Development Fund, the Puerto Rico Housing Finance Corporation, the Puerto Rico Higher Education Assistance Corporation, the Puerto Rico Student Loan Association, the Puerto Rico Development Bank Fund and the Puerto Rico Public Finance Corporation; and two affiliates created by statute: the Industrial, Medical and Environmental Pollution Control Facilities Financing Authority and the Municipal Finance Agency.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS BELOW	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT OF THE CASE	2
A. The Government Development Bank for Puerto Rico	3
B. Respondent's Position and Duties Within the Bank	5
C. The District Court's Decision	6
D. The Court of Appeals' Decision	7
REASONS FOR GRANTING THE WRIT	9
I. The Court of Appeals for the First Circuit erroneously interpreted the *Elrod-Branti* doctrine, severely restricting and undermining the exception to First Amendment protection recognized by this Court in those decisions.	10

II. Conflicting approaches among Courts of Appeals and District Courts and the general confusion surrounding the interpretation of the *Elrod-Branti* doctrine require clarification by this Court. 20

CONCLUSION 28

TABLE OF AUTHORITIES

Page

Cases:

Awtry v. *United States*, 684 F.2d 896 (C.Cl. 1982) ... 12n

Branti v. *Finkel*, 445 U.S. 507 (1980) ..... *passim*

Brown v. *Trench*, 787 F.2d 167 (3rd Cir. 1986) .. 13, 21, 23

Brunton v. *United States*, 518 F.Supp. 223 (S.D. Ohio, E.D. 1981) 25

Colón v. *Municipality of Ceiba*, 112 D.P.R. 740 (1982) 5n

Connick v. *Myers*, 461 U.S. 138 (1983) 25

De Abadía v. *Izquierdo Mora*, 792 F.2d 1187 (1st Cir. 1986) 23

De Choudens v. *Government Development Bank*, 801 F.2d 5 (1st Cir. 1986) 1

Ecker v. *Cohalan*, 542 F.Supp. 896 (E.D.N.Y. 1982) . 20, 21

Elrod v. *Burns*, 427 U.S. 347 (1976) ..... *passim*

Gannon v. *Daley*, 561 F.Supp. 1377 (N.D Ill. 1983) . 24

García v. *San Antonio Metro. Transit Authority* 469 U.S. , 83 L.Ed. 2d 1016, 105 S.Ct. 1005 (1985) . 27

Garretto v. *Cooperman*, 510 F.Supp. 816 (S.D.N.Y. 1981) 12n, 25

Grossart v. *Dinaso*, 758 F.2d 1221 (7th Cir. 1985) 12n, 24

Horton v. *Taylor*, 767 F.2d 471 (8th Cir. 1985) 24

Jiménez-Fuentes v. *Torres Gaztambide*, No. 85-1655, Slip. op. (1st Cir. September 19, 1986) ..... *passim*

Jones v. *Dodson*, 727 F.2d 1329 (4th Cir. 1984) 25

Joyner v. *Lancaster*, 553 F.Supp. 809 (M.D.N.C. 1982) 21

Loughney v. *Hickey*, 635 F.2d 1063 (3rd Cir. 1980) ... 23

Meeks v. *Grimes*, 779 F.2d 417 (7th Cir. 1985) .. 12n, 24 27

Mitchell v. *Forsyth*, 472 U.S. , 86 L.Ed.2d 411, 105 S.Ct. 2806 (1985) 19n

McBee v. *Jim Hogg County*, 730 F.2d 1009 (5th Cir. 1984) 24

Nekolny v. *Painter*, 653 F.2d 1164 (7th Cir. 1981) 9, 12n, 17n, 20, 21

Ness v. *Marshall*, 660 F.2d 517 (3rd Cir. 1981) . 12n, 21, 23

Perry v. *Sindermann*, 408 U.S. 593 (1972) 10

Pickering v. *Board of Education*, 391 U.S. 563 (1968) 25

Quirós v. *Hernández Colón*, 800 F.2d 1 (1st Cir. 1986) 14n

Rosario Nevares v. *Torres Gaztambide*, 633 F.Supp. 287 (D.P.R. 1986) 14n

Shakman v. *Democratic Organization of Cook County*, 722 F.2d 1307 (7th Cir. 1983) 21, 22, 24

Smith v. *Vulcan Iron Works*, 165 U.S. 518 (1897) 7n

Soderbeck v. *Burnett County, Wis.*, 752 F.2d 285 (7th Cir. 1985) 21

Thornburgh v. *American College of Obstetricians and Gynecologists*, 476 U.S. , 90 L.Ed.2d 779, 106 S.Ct. 2169 (1986) 7n

Tomczak v. *City of Chicago*, 765 F.2d 633 (7th Cir. 1985) 17, 18, 21, 22, 23

Visser v. *Magnarelli*, 530 F.Supp. 1165 (N.D.N.Y. 1982) 25

Constitutional Provisions:

United States Constitution

First Amendment ..... *passim*
Fifth Amendment 2
Fourteenth Amendment 2

Statutes & Rules:

28 U.S.C. Section 1254(1) 1
3 L.P.R.A. Section 1301,
et seq. (Act No. 5 October 14, 1975) 5n
3 L.P.R.A. Section 1312(5) 5n
3 L.P.R.A. Section 1338 ..... 5n
3 L.P.R.A. Section 1350 ..... 5n
3 L.P.R.A. Section 1351 ..... 5n
7 L.P.R.A. Section 551, et seq.
(Act No. 17 September 23, 1948) ..... iin, 3

Miscellaneous:

Brewer, G.D. and De Leon, P., *The Foundation of Policy Analysis*, The Dorsey Press, 1983 ..... 17n

Holloway, W. and Leech, M.J., *Employment Termination-Rights and Remedies*, B.N.A. 1985 ... 25n

Note, *Consideration of Administrative Loyalty in Identifying Positions Exempt from the Shakman Decree*, 17 Loyola University Law Journal 119 (1985) 26n

Note, *Constitutional Limitations on Patronage Practice: Branti v. Finkel*, 42 Louisiana Law Review 310 (1981) 26n

Note, *First Amendment Limitations on Patronage Employment Practices*, 49 University of Chicago Law Review 181 (1982) 26n

Note, *Politics and the Non-Civil Service Public Employee: A Categorical Approach to First Amendment Protection*, 85 Columbia L. Rev. 558 (1985) 25n

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OPINIONS BELOW.

The opinion of the Court of Appeals is reported at 801 F.2d 5 (1st Cir. 1986), and appears reprinted in Appendix B. The opinion of the District Court, not yet reported, appears reprinted in Appendix C.

JURISDICTION.

The judgment of the Court of Appeals was entered on September 19, 1986, as it appears from Appendix A. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The First Amendment to the Constitution of the United States provides that:

> "Congress shall make no law ... abridging the freedom of speech ... or the right of the people peacefully to assemble ...".

The First Amendment applies to the Commonwealth of Puerto Rico through either the Fifth or the Fourteenth Amendments.

STATEMENT OF THE CASE.

The issue in this case is whether a top-ranking government official like respondent, found by both Courts below to be a substantial policymaker, whose job also involves the reposing of confidence to the highest degree and "communicating" or spokesperson duties, may successfully challenge on First Amendment grounds her demotion and simultaneous reinstatement to a tenured position, alleged to be politically motivated.

Respondent occupied the position of Senior Vice President and Director of the Area of Finance of the Government Development Bank for Puerto Rico (the Bank) for most of an 8-year administration of the New Progressive Party. The Popular Democratic Party administration elected in November of 1984 transferred her to a lesser position within the Bank on April of 1985. Claiming that such action was due solely to her political affiliation, she brought an action before the District Court for Puerto Rico under 42 U.S.C. 1983 seeking reinstatement and damages from the Bank, its President, and the members of its Board of Directors.

Although it is undisputed that respondent's policymaking, confidential and "communicating" or spokesperson duties are related to the exclusively governmental purposes and goals of the Bank, the District Court granted respondent's request for a preliminary injunction reinstating her to her critically influential position. The District Court interpreted this Court's reformulation in *Branti* v. *Finkel*, 445 U.S.

507 (1980), of its earlier ruling in *Elrod* v. *Burns*, 427 U.S. 347 (1976), in a way that would afford First Amendment protection in employment even to top government policymakers and participants in confidence whose duties, like respondent's, significantly affect public policy. According to the Court, after *Branti* it was not enough for an official to be substantially involved with government public policy since this Court had required an excepted official to be also involved with "partisan political interests or concerns".

The Court of Appeals affirmed that decision and upheld and more amply articulated the District Court's views on the *Elrod-Branti* doctrine. In opinions delivered the same day in this and a companion case, *Jiménez-Fuentes* v. *Torres-Gaztambide*, No. 85-1655, slip op. (1st Cir. September 19, 1986), the Court announced an interpretation of the *Elrod-Branti* doctrine that extends constitutional protection in employment to public officials whose duties involve matters of agency administration, characterized as "technical" and "professional", even if they are found to be, like respondent, substantial government policymakers, participants in confidence and "communicators". This view is not shared by any other Court of Appeals, none of which has ever found a government official of respondent's rank and influence in a government agency's affairs to be protected from politically motivated adverse employment action, nor required, in order for such protection to be unavailable, that the official's duties go beyond substantial participation in the formulation or implementation of government public policy or in confidential matters related thereto. Petitioners contend that few cases could demonstrate as plainly as this one does why the First Circuit's interpretation of the *Elrod-Branti* doctrine must be rejected.

A. The Government Development Bank for Puerto Rico

Respondent was one of three Senior Vice Presidents of the Government Development Bank for Puerto Rico, an institution vital to the Commonwealth. Both Courts below "scrutinized" the Bank to determine its role in the government. From both Courts' findings, see Appendix ("App.") A6-A7, A24-A25; the Bank's enabling statute, Act No. 17 of September 23, 1948, 7 L.P.R.A. 551 et seq.; and the Bank's 1984 Annual Report, an exhibit on which both Courts relied,

the following picture of the Bank may be obtained.

As of 1984, it had nearly $4 billion of assets, year-end capital of $249 million and some 300 employees. Its purpose is to aid the government of the Commonwealth of Puerto Rico in the performance of its fiscal duties and in carrying out its governmental responsibilities to develop the economy of Puerto Rico, particularly with respect to its industrialization. The Bank has three primary functions: (1) fiscal agent and financial advisor to the Commonwealth government, its agencies, municipalities and public corporations, and financial advisor to the Governor of Puerto Rico; (2) lender to government and private industry; and (3) depository and trustee of Commonwealth government funds.

In its role as fiscal agent, the Bank's approval is necessary for all government borrowing; it oversees the borrowing for capital improvements programs and arranges financings for other requirements such as working capital; and handles all sales of all notes, bonds and other government obligations in the capital markets. As financial advisor the Bank participates in all government fiscal matters, including the elaboration of fiscal and financial policies at all government levels. The Bank also makes direct loans to public corporations and municipalities and also grants direct financing for economic development purposes to the private sector. The Bank is the principal depository for the funds of the Commonwealth government and its agencies. It handles, under the direct supervision of the position previously occupied by respondent, the current account of the Department of the Treasury and other government entities, establishing policies designed to maximize the use of governmental funds. Finally, through its subsidiaries and affiliates, the Bank has a vital role in the private financing of various production sectors of the economy.

In short, the Bank's functions are critical in the planning and implementation of all government financial and economic policies and in the development of private industry. The Court of Appeals in fact described the Bank's objectives as "legitimate partisan goals for government operations". App. A7.

B. Respondent's Position and Duties Within the Bank

As Senior Vice President in charge of the Area of Finance of the Bank, a "confidential position" under Commonwealth law[1], respondent headed "one of the Bank's three main operation areas ... the other two ... being the Investment, Treasury and Public Financing Area and the Private Financing Area." Court of Appeals' Opinion, App. A8, and see App. H, Organization Chart of the Bank. As determined by the District Court, whose findings regarding respondent's position were found by the Court of Appeals to be "amply supported", App. A8, respondent's was a high level, policymaking and confidential position where she enjoyed "broad discretion to implement and discharge her duties and ... provide[d] valuable advice to higher bank officials." App. A26. Respondent herself admitted at trial that this advice included Bank matters outside her area. In fact, the position's official description requires "participat[ion] in the formulation and development of the lending policies" of the Bank.

Among other critical functions within the Bank, the District Court expressly concluded that the respondent, as Head of the Area of Finance, "was in charge of planning, coordinating, directing and supervising" the operations of the Area of Finance; "gave advice to the President and the Board of Directors on financial matters within

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[1] Under the Civil Service Act, No. 5 of October 14, 1975, 3 L.P.R.A. 1301 et seq., the purpose of the confidential service is identical to the *Elrod-Branti* exception's: "[t]o assure that the government has adequate means ... to implement the public policy validated by the majority ...". 3 L.P.R.A. 1312(5). It includes those who intervene or collaborate substantially in the formulation of public policy or directly serve or advise the head of the agency. They may not acquire tenure and are freely selected and removed, but a confidential employee who has previously held a career position is entitled to reinstatement in a position equal or similar to his last career position, if removed from the confidential position. 3 L.P.R.A 1350, reprinted in App. F. Confidential employees are generally limited to 25 per agency, 3 L.P.R.A. 1351, reprinted in App. F, and must comply with the statutory requirements to qualify as such. *Colón* v. *Municipality of Ceiba*, 112 D.P.R. 740 (1982). The Bank is not subject directly to the statute, see 3 L.P.R.A. 1338, but to adopt regulations embodying the merit principle. *Id*. Its regulations for confidential positions, reprinted in App. G, closely follow the statutory directives.

Career employees, who are selected strictly on merit and can only be removed for cause, Court of Appeals' Opinion, App. A49, comprise the immense majority of public employees in the Commonwealth.

her area"; "is also a member of the Loan Committee of the Bank"; "may act as interim President"; "acts as advisor on accounting matters to government agencies"; "maintains and updates all the Bank's internal systems and procedures to ensure that there are adequate internal controls"; "examines all of the Bank's proposed disbursements to ensure that they are made in accordance with the approving authority"; "prepares and monitors the Bank's annual budget"; "monitors the payment of the central government['s] ... public debt and maintains accounting records for the central government's sinking fund"; "maintains accounting records of ... loans and prepares monthly and annual statements"; supervises all "data processing activities which include three divisions responsible for all the computerized data services"; "is in charge of the Secretary of the Treasury['s] ... account and the payment of all central government checks issued by the department and other agencies ... [also] serving all government accounts". App. A24-A25. In sum, the Court had "no quarrel" that respondent "is a policymaker and has access to confidential information within the bank." App. A26.

The Court of Appeals, too, acknowledged that respondent was "a top policymaking official in a public agency," App. A10, and that her "responsibilities signify a position of substance, of valued policy contributions, recommendations, and advice," App. A9.

C. The District Court's Decision

Nevertheless, the District Court rejected the position that public offices with policymaking and confidential duties connected to government public policy are offices for which political affiliation is an appropriate requirement. Instead, the Court considered the primary question under *Branti* to be "whether the policymaking and access to confidential information by the particular employee was related to *partisan political interests*, not to public policy ...". App. A26 (emphasis in the original). The Court thus interpreted *Branti*'s reformulation of the standard of *Elrod* that a public employee is excepted from First Amendment protection from politically motivated dismissal if "party affiliation is an appropriate requirement for the effective performance of the public office involved", *Branti*, supra, at 518, as requiring from the position in question more than an effective participation in the government's policymaking, policy implementation or

confidential processes.

This view of the standard is based on a literal construction of two phrases used by this Court in *Branti*, where after having announced and explained the reformulation of the *Elrod-Branti* exception, it stated that the functions of the plaintiffs there, two Assistant Public Defenders, involved no policymaking related to "partisan political interests" nor confidential information having a bearing on "partisan political concerns", 445 U.S., at 519, because their duties as public employees were related to the needs of their individual clients, as distinguished from the needs and the goals of the government as such. According to the District Court's interpretation of *Branti*, then, "partisan political interests or concerns" must be the subject of the duties of any office for which "party affiliation is an appropriate requirement." The Court did not define what "partisan political interests or concerns" means in this context.

D. The Court of Appeals' Decision

The Court of Appeals affirmed the District Court's Order granting respondent's request for a preliminary injunction.[2] In this and a companion case, *Jiménez-Fuentes* v. *Torres-Gaztambide*, No. 85-

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[2] Since the decision below "rests solely on a premise as to the applicable rule of law, and the facts are established or of no controlling relevance, that ruling may be reviewed even though the appeal is from the entry of a preliminary injunction." *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 106 S.Ct. 2169, 2177 (1986). "With a full record before it" on legal issues, this Court is "justified in proceeding to plenary review", because limited review in a case of this kind "is a rule of orderly judicial administration, not a limit on judicial power". *Id.*

Here, a "full record" was developed below on the legal issues decided by the Court of Appeals. "Extensive evidence, testimonial and documentary, was presented by both parties and post-hearing briefs were simultaneously filed" before the District Court. App. A13. The Court of Appeals reviewed a transcript of a four-day trial and an appendix of all relevant documentary evidence. No substantial additional facts "are likely to emerge at trial". See *Thornburgh*, supra, at 2177, n. 8. The fact that relief is sought from the entry of a preliminary injunction is therefore no bar to review. "[R]eview of interlocutory appeals was designed not only to permit the defendant to obtain immediate relief but also in certain cases to save the parties the expense of further litigation." *Id.*, at 2176, paraphrasing *Smith* v. *Vulcan Iron Works*, 165 U.S. 518, 525 (1897).

1655, slip op. (1st Cir. September 19, 1986), reprinted in App. E, the Court adopted an interpretation of the *Elrod-Branti* standard that requires that a given position be related to "partisan political interests or concerns" to be excepted from First Amendment protection under that doctrine. According to the Court the *Branti* test that "party affiliation is an appropriate requirement for the effective performance of the public office involved" requires that the duties of a particular position be directly related to "partisan political interests or concerns", in that "a sufficient nexus [must exist] between the position at issue and the kind of policy relating to partisan concerns". App. A10.

The Court adopted a two-step analysis to determine whether, according to its particular interpretation of the *Elrod-Branti* doctrine, a given position is excepted from First Amendment protection thereunder. First, "[a] threshold inquiry, which derives from *Branti*, involves examining whether the position at issue, no matter how policy-influencing or confidential it may be, relates to 'partisan political interests ... [or] concerns.' 445 U.S., at 519." App. A40. "If this first inquiry is satisfied, the next step is to examine the particular responsibilities of the position to determine whether it resembles a policymaker, a privy to confidential information, a communicator, or some other officeholder whose function is such that party affiliation is an equally appropriate requirement."[3] *Id.*

In this case, although concluding that the Bank had "legitimate partisan goals for government operations", App. A7, and that respondent's position was "indubitably ... policymaking, confidential and communicative", *Id.*, with responsibilities that "signify a position of substance, of valued policy contributions, recommendations and advice", App. A9, the Court failed to connect the position with "the kind of policy relating to partisan concerns." App. A10. While recognizing "the closeness of a case involving the political firing of a top policymaking official in a public agency", *Id.*, the Court nevertheless held that party affiliation was not an appropriate requirement for respondent's position, because her duties involved "technical and

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[3] Actually, the Court's analysis involves three steps: determining whether the government agency pursues partisan goals, see App. A6-A7, A42-A44; whether the position involved has policymaking, confidential or spokesperson duties; and, if so, whether the position has duties bearing on the agency's partisan goals. App. A7-A9.

professional matters" of agency administration which it characterized as "politically neutral". App. A9.

REASONS FOR GRANTING THE WRIT.

This Court made clear in *Elrod* v. *Burns*, 427 U.S. 347 (1976), that an important exception must exist to the general rule that public employees may not be dismissed solely for their political beliefs. Representative government requires, in order to be effective, that a newly elected administration be able to substitute, even on political affiliation grounds, those employees that are in a position to "obstruct [ ] the implementation of policies of the new administration". 427 U.S., at 367. Since policymaking individuals are in a position to "thwart the goals of the in-party", *id.*, this Court agreed that dismissal of such individuals was constitutionally permissible in order to achieve the vital governmental end of allowing representative government to work.

Branti v. *Finkel*, 445 U.S. 507 (1980), later clarified that merely labeling an official as "policymaking" or "confidential" is insufficient to except him from constitutional protection. Attention must be paid to the actual nature of the official's duties to make sure that political affiliation is truly relevant to a particular position. But, as the Seventh Circuit has decided, "[a] narrow definition of who is a policymaker" for purposes of the *Elrod-Branti* doctrine "necessarily increases the chances of 'undercut[ting] ... the implementation of the policies of the new administration, policies presumably sanctioned by the electorate'. *Elrod*, 427 U.S., at 367, 96 S.Ct., at 2687." *Nekolny* v. *Painter*, 653 F.2d 1164, 1169-1170 (7th Cir. 1981), cert. denied 455 U.S. 1021 (1982), and an unduly restrictive interpretation of the exception necessarily destroys its purpose.

The First Circuit's interpretation of the exception, contrary to the Seventh Circuit's, significantly restricts its scope, completely frustrates its purpose and enormously curtails the "ability of the government to implement the will of the people [that] is fundamental to our system of representative democracy." *Nekolny*, 653 F.2d, at 1170. That interpretation, which presumes that high-ranking public officials like respondent may not "thwart the goals" of a new administration if

their duties in agency administration involve what the Court characterized as "technical and professional" matters, is contrary *not only to* the meaning of this Court's decisions but to reality and should not be allowed to stand by this Court.

I. The Court of Appeals for the First Circuit erroneously interpreted the *Elrod-Branti* doctrine, severely restricting and undermining the exception to First Amendment protection recognized by this Court in those decisions.

In *Elrod*, this Court concluded that political patronage dismissals of public employees violate First Amendment rights of political belief and association. Five Justices agreed on the common ground of *Perry* v. *Sindermann*, 408 U.S. 593 (1972)[4] that conditioning public employment on the support of a particular political view violated the First Amendment.

This Court recognized, however, that "the prohibition on encroachment of First Amendment protections is not an absolute. Restraints are permitted for appropriate reasons." 427 U.S., at 360 (plurality opinion). Employees engaged in policymaking or confidential positions are not entitled to protection and may constitutionally be dismissed for political reasons. The rationale found to justify this exception is that the state has a "paramount" interest, "one of vital importance", *Id.*, at 362, in "...the need for political loyalty of employees ... to the end that representative government not be undercut by tactics obstructing the implementation of policies of the new administration, policies presumably sanctioned by the electorate", and this interest overrides the First Amendment rights of policymaking employees. *Id.*, at 367. The same reasoning applies to confidential employees which, according to the concurring opinion, are also excluded from protection. *Id.*, at 375. This Court warned, nevertheless, that "care must be taken not to confuse the interest of

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[4] "... Mr. Justice Brennan ... stated that the practice had the effect of imposing an unconstitutional condition on the receipt of a public benefit and therefore came within the rule of cases like *Perry* v. *Sindermann* ...". *Branti* v. *Finkel*, 445 U.S. 507, 514 (1980). "Mr. Justice Stewart's opinion ... expressly relied on the same passage from *Perry* v. *Sindermann*" quoted in the plurality opinion. *Id.*, at 516.

partisan organizations with governmental interests. Only the latter will suffice." *Id.*, at 362.

In *Branti* v. *Finkel* this Court restated the test set forth in *Elrod* for determining whether a public employee is entitled to protection. The Court indicated that "the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti*, 445 U.S., at 518. This standard, while refusing to adscribe talismanic virtues to labels, does not represent an abandonment of *Elrod*'s nonpolicymaking, nonconfidential test.[5] *Branti*'s analysis in fact relied and its conclusion depended on the extent to which the position of Assistant Public Defender did not involve policymaking and confidentiality connected to government public policy.[6] No alternative standards for determin-

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[5] Nothing in *Branti* indicates an intention to substantially alter the rules set down in *Elrod*. This Court made it clear that it was the holding of *Elrod* that was being applied. *Branti*, 445 U.S. 512, n. 6 ("Unlike Mr. Justice Powell in dissent ... petitioners do not ask us to reconsider the holding in *Elrod*"). Moreover, the question presented by *Branti* was carefully framed to address only the particular office of the respondents, 445 U.S., at 508, and this Court expressly refused to make pronouncements on other matters either raised by the parties, *Id.*, at 513, n. 7 (refusing to consider an argument by petitioners "[i]n light of the limited nature of the question presented"), or by analogy of other positions to that of the respondents, *Id.*, at 519, n. 13 (refusing to express an opinion on whether a deputy prosecutor can be dismissed on grounds of political party affiliation).

[6] This Court relied in the District Court's findings about the duties of the officials involved. These show that they were not governmental policymakers according to *Elrod*'s criteria: "... respondents had 'very limited, if any, responsibility' with respect to the overall operation of the public defender's office [,] ... did not 'act as advisors or formulate plans for the implementation of the broad goals of the office' and, although they made decisions in the context of specific cases, 'they do not make decisions about the orientation and operation of the office in which they work'[, and] ... the only confidential information to which they had access was the product of their attorney-client relationship with the office's clients; to the extent that such information was shared with the public defender, it did not relate to the formulation of office policy." 445 U.S., at 511.

Since the exception covers only those "policymakers ... who formulate governmental policy; ... It does not appear that the *Branti* opinion gave direct

ing when political affiliation might be an 'appropriate requirement' for public employment under the reformulated test were announced, either. As a result, the distinctions between *Branti* and *Elrod* have been widely considered more aclaratory than substantive.[7]

Nonetheless, *Branti* rejected the notion that the *Elrod* exception should be applied to *all* policymaking and confidential positions, without regard to the activity or the matters to which such policymaking and confidentiality relate, since "party affiliation is not necessarily relevant to every policymaking or confidential position". *Id.* Instead, *Branti* requires a careful examination of the nature of the functions of the position at issue to determine not only if they involve policymaking, confidential or spokesperson responsibilities, but also if their subject matter implicates the kind of activity for which party

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consideration to the issue as it affects true governmental policymakers, no doubt because the issue was not raised by the facts of that case." *Garretto* v. *Cooperman*, 510 F.Supp. 816, 820 (S.D.N.Y. 1981).

[7] Noting in *Branti* that "it is not always easy to determine whether a position is one in which political affiliation is a legitimate factor to be considered", 445 U.S., at 518, this Court referred, as raising the same issue, to that passage in *Elrod* where Justice Brennan explains that "[no] clear line can be drawn between policymaking and nonpolicymaking positions". 427 U.S., at 367. This equivalence between positions that may require a particular political affiliation and true government policymaking positions is fully consistent with *Branti*'s rejection of the practice of *labeling* positions as policymaking that actually are not.

On the government policymaking-appropriate requirement equation, post *Branti*, see : *Meeks* v. *Grimes*, 779 F.2d 417, 420 (7th Cir. 1985) ("Policymaking type positions ... are invariably offices for which political affiliation is a legitimate job criterion"); *Grossart* v. *Dinaso*, 758 F. 2d 1221, 1226 (7th Cir. 1985) ("Elected officials must be able to rely on the political loyalty and compatibility of a policymaking civil servant in order to ... realize their electoral mandate"); *Awtry* v. *U.S.*, 684 F.2d 896, 902 (C.Cl. 1982) ("We were aware of *Branti* ... but quoted at length the 'policymaking' language of *Elrod*, thus showing we did not then consider anything in *Elrod* to have been overruled or modified by *Branti* ... That is still our opinion."); *Garretto* v. *Cooperman*, 510 F.Supp. 816, 819 (S.D.N.Y. 1981) (Holding that *Branti* standard was dictum). Other decisions, while citing *Branti*, have applied the policymaking analysis of *Elrod*: see *Nekolny* v. *Painter*, 653 F.2d 1164, 1169 (7th Cir. 1981) (Court persuaded that jury could reasonably find that plaintiff was within the "policymaking exception"); *Ness* v. *Marshall*, 660 F.2d 517, 521 (3rd Cir. 1981) (City solicitors involved in policy considerations beyond narrow legal issues).

affiliation is a relevant and legitimate consideration. This process involves above all a common sense judgment on the totality of the circumstances surrounding the position to ascertain if it may be considered political. Thus, this Court explained that although a state university football coach formulates policy, "no one could seriously claim that Republicans make better coaches than Democrats". *Id.* Football's connection to politics and representative government is certainly far removed. Similarly, although Assistant Public Defenders like the *Branti* plaintiffs could make policy and receive confidential information in connection with their clients' cases, their primary responsibility of representing individuals in controversy with the state made political affiliation not relevant to their position. But, on the other hand, for the duties of a position related to true government activity, an essential part of the political process, like assisting an elected official to communicate with the public, the press and other elected officials, political affiliation is generally relevant, and becomes the basis for the *Elrod-Branti* exception to First Amendment protection in government employment. *Id.*

This considered judgment as to specific positions is a necessary consequence of the purpose for which the exception exists, that is, to advance the vital government interest of preventing the implementation by the government of the policies of a new administration from being obstructed by officials affiliated to a different party. *Elrod*, 427 U.S., at 367. Since there may be positions in the government that may be labeled as "policymaking" and "confidential" and yet do not affect the formulation or implementation of true government public policy, which is always political, but the "needs of individual clients", as happened with the Assistant Public Defenders in *Branti*, 445 U.S., at 519, this Court made it clear there that not every policymaking and confidential position is excepted from the general rule: only those for which "party affiliation is an appropriate requirement for the effective performance of the public office involved", *Id.*, at 518, because they may affect significantly the formulation and implementation of the public policy or government programs of a new administration, are excepted.

Because this Court did not expressly state the "particular factors which indicate that a position falls within the *Branti* test", *Brown* v. *Trench*, 787 F.2d 167, 169 (3rd Cir. 1986), lower courts had to

formulate working rules incorporating their views on *Branti*'s effect on *Elrod*. The Court of Appeals for the First Circuit had not faced that task until now.[8] In this and its companion case, *Jiménez-Fuentes* v. *Torres-Gaztambide*, the District Court had granted preliminary injunctions requiring the reinstatement of the plaintiffs to their positions. After vacating a panel decision in *Jiménez-Fuentes*, the Court decided to hear argument in both cases. Its decisions correctly acknowledge that *Branti* departed from the use of labels alone to determine if a policymaking or confidential position is within the *Elrod-Branti* exception. *Jiménez-Fuentes*, App. A37. They also recognize the reformulation of the test to be "'whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved', 445 U.S., at 518." App. A38.

However, the Court attributed a literal and decisive significance to this Court's remarks that the duties of the *Branti* plaintiffs did "not relate to partisan political interests [or concerns]", 445 U.S., at 519, and adopted on that basis a restrictive interpretation of the reformulated standard that has no justification in either *Elrod* or *Branti*. The "threshold inquiry" of a multiple-step analysis it adopted, see p. 8 and note 3, supra, "involves examining whether the position at issue, no matter how policy-influencing or confidential it may be relates to 'partisan political interests ... [or concerns]'". App. A40. In *Jiménez-Fuentes*, the Court concluded that the plaintiffs, Regional

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[8] After the change of administration in Puerto Rico following the general elections of November 1984, more than 200 cases were filed in the District Court by employees of Commonwealth agencies claiming to be protected under the *Elrod-Branti* doctrine. See Appendix B, Certification of the Clerk of the Court, in *Rosario Nevares* v. *Torres Gaztambide*, 633 F.Supp. 287, 303 (D.P.R. 1986). Many involve the top hierarchy of cabinet departments and public corporations. A suit by the Secretary of State and of Labor of the previous administration, who was terminated by the new Governor as a member of the Board of Directors of the Bank was dismissed, but found to have "required close judicial scrutiny". See *Quirós* v. *Hernández Colón*, 800 F.2d 1, 2 (1st Cir. 1986). Pending cases include an Undersecretary of Education, two Assistant Secretaries of Agriculture, an Assistant Secretary of Justice, the Deputy Executive Director of the Puerto Rico Aqueducts and Sewers Authority, the General Counsel of the Puerto Rico Telephone Company, and the Senior Vice President, Private Financing and the Vice President, Administration of the Bank.

Directors of a public housing corporation, satisfied the requirements of this restrictive inquiry because they were "proconsuls for their agency within their region, representing the agency in all respects. Each region was a microcosm of the larger agency, and the duties of each regional director were representative of the duties of the agency's executive director." Court of Appeals' Opinion, App. A7. In respondent's case, however, the Court found that "[b]ecause her division is not a microcosm of the larger agency, it is insufficient to show that she is a policymaker for a bank that involves partisan political concerns." App. A7-A8. Although her "responsibilities signify a position of substance, of valued policy contributions, recommendations, and advice", App. A9, and this made her "a top policymaking official in a public agency", App. A10, the Court found that the agency administration responsibilities of the area of the Bank which she headed involved "technical and professional matters" which the Court characterized as "politically-neutral" and as not requiring the incumbent to share the political affiliation of the agency head. App. A9.

The First Circuit's restrictive interpretation of the *Elrod-Branti* exception must be rejected by this Court. It effectively establishes an "exception to the exception", an erroneous and unjustified substandard meant to be applicable to true government policymakers involved in what the Court describes as "technical and professional matters", actually crucial aspects of agency administration. It carves out from the *Elrod-Branti* exception and unduly affords constitutional protection in their jobs to a substantial number of influential public officials that may "undercut [representative government] by tactics obstructing the implementation of policies of the new administration." *Elrod*, 427 U.S., at 367. Further, it is based on the premise that *Branti*'s remarks about "partisan political interests or concerns" were meant to be interpreted literally and not as implicating true government public policy.

The Court's views on the kind of positions that may influence the processes of government, public policymaking and its implementation, which are indissolubly tied to political goals, are unwarranted. Officials elected by the people to implement their political programs, and those that they appoint to define, limit or develop broad general goals or implement them do not operate in a vacuum, unassisted and unsupported by others who might possibly not define or implement

themselves those goals, but who are nevertheless indispensable for the primary political leadership of an agency to be effective. All government agencies invariably need positions that, although not calling for the actual definition, development or implementation of political, or public policy, goals, are nevertheless essential to the policymaking process because they require a substantial amount of input into public policy decisions made or implemented by others.

Positions entrusted with the broad and fundamental responsibility for an agency's administration, for example, are essential to policymaking and policy implementation. They normally encompass the entire administrative apparatus of the agency, namely the finance, budget, accounting, controllership, data processing, personnel and general services and managerial functions of the agency. Officials in charge of these functions may, although in some cases not defining themselves political goals and objectives, also "make the difference between the acclaimed success of a government agency or program and its failure or, more typically, its lackluster performance." App. A40. The difference between a policymaker's or policy implementor's effectiveness or failure is more often than not dependent on the enthusiasm and initiative of these generally powerful officials. Foot-dragging in these areas makes effective policymaking or implementation as to strategic goals from difficult to impossible.

Respondent's own position in particular indeed implicates the kind of policymaking and implementation associated with ultimate public policy-political goal fixing. The duties that both Courts below attributed to her position require this conclusion. Among others, she "contribut[ed] to investment strategy", App. A9, "gave advice to the President and the Board of Directors on financial matters within her area", "act[ed] as advisor on accounting matters to government agencies", and "act[ed] as interim President" of the Bank. App. A24-A25. The power to act as President of the Bank in itself is enough to except her from constitutional protection in employment. An official whose job involves substitution for the head of the agency may unquestionably be required to share his political affiliation. But, although the Court adopted the view in *Jiménez-Fuentes*, App. A41, that what matters are "'the powers inherent in a given office, as opposed to the functions performed by a particular occupant of that office'", see *Tomczak* v. *City of Chicago*, 765 F.2d 633, 640 (7th Cir.

1985); *Ness* v. *Marshall*, 660 F.2d 517, 522 (3rd Cir. 1981), in respondent's case it trivialized the occasions shown by the record in which respondent in fact acted as President of the Bank. Finally, the official description of respondent's position expressly requires "participat[ion] in the formulation and development of the lending policies" of the Bank, and respondent herself admitted at trial that her advice to the President and the Board of Directors included bank matters outside her area. But even discounting this participation in the fixing of ultimate goals, it seems evident that the control of the accounting, budgeting, data processing, disbursements and internal systems and procedures of the Bank has a decisive influence in the formulation and achievement of the Bank's governmental endeavors responsive to public policy.[9]

To arrive at considered decisions on government borrowing, for example, be it for capital improvements or other requirements such as working capital, and to advise the central government, the public corporations and the municipalities as to fiscal and financial policies, the President and the Board of Directors of the Bank rely by necessity on the accuracy and relevancy of all the financial and accounting data and information monitored, collected, organized, controlled and provided by respondent's subordinates. Ideologically oriented screening and selection of the data provided to the policymakers may decisively tilt the balance towards a particular approach or decision. Information withheld from the policymakers may affect the process in another direction.[10] Control of the budget, essentially an exercise in

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[9] Since "[p]olicymaking or policy implementation may occur at many levels, even within a particular office whose sphere of authority is narrowly circumscribed", *Nekolny* v. *Painter*, 653 F.2d, at 1170, it is not necessary for a position to be excepted from the general rule of employment protection that its occupant have the final decision as to public policy. *Tomczak* v. *City of Chicago*, 765 F.2d, at 642.

[10] In fact, there is no stage in the public policy process to which accurate and relevant information is not fundamental. It is essential from the initial phase, including problem recognition, which is "a function of both the information received and one's ability to interpret it," see G.D. Brewer and P. de León, *The Foundation of Policy Analysis*, The Dorsey Press, 1983, p. 33; during the vital phase of selection or decision on alternatives, *id.*, at 200-203; and up to its conclusion. It is unquestionable that "virtually no information is neutral; almost all information will have already been

priorities, affects the means and the ability of the different operational areas of the Bank to achieve their objectives. Stronger support for investment, for example, may result in a decline in the politically-sensitive industrial development promotions. Control of disbursements similarly may affect the performance of the Bank's obligations to the government and the public or the flow of outside services essential to the Bank and its policymakers for their work.

In sum, respondent's responsibilities, like "the power to make rules and recommend reorganization, the oversight of accounting policy, a contribution to investment strategy, budget and personnel recommendations, and software advice ... signify a position of substance, of valued policy contributions, recommendations and advice", Court of Appeals' Opinion, App. A9. Even if they could be correctly characterized as "technical and professional" they have the immediate potential of obstructing the formulation, development and implementation of politically-sensitive government objectives. Policymaking and implementation involve choices including ideological and technical components indissolubly tied to each other. As the President of the Bank testified, respondent's "Finance Area was the most important of the Bank's three areas for the 'internal work' of the Bank to ensure 'the proper flow of work'". Court of Appeals' Opinion, App. A9-A10. As found by the District Court, respondent's area provides the necessary services and information "to give other areas of the bank the necessary input to make their decisions." District Court's Opinion, App. A28.

These considerations about respondent's position and its potential ability to hinder or ensure the success of the agency's policies are equally applicable to equivalent positions existing in all federal, state and local government agencies throughout the United States. The political affiliation of the persons occupying these positions "could affect the ability of a new administration to implement new policies", *Tomczak*, 765 F.2d, at 642, to possibly the same extent as that of the officials that themselves define and implement politically-responsive public policy and government objectives, because the latter may not be effective without the support of the former. The decision of the Court of Appeals in this case, however, would prevent agency heads

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processed, interpreted and evaluated according to sets of objectives that are not guaranteed to jibe with (the decisionmakers' objectives)". *Id.*, at 201.

from taking into consideration the political affiliation of the incumbents of such positions in the crucial decisionmaking process of their selection or retention.[11]

Finally, the meaning of this Court's reference in *Branti* to partisan political interests and concerns must be found in the general context of *Branti*'s restatement of the *Elrod* holding. What is fundamental in *Branti* is its clarification that not all policymaking or confidential positions are excepted from First Amendment protection. Only those for which political affiliation is relevant, which touch "partisan political interests or concerns", are excepted.

To determine what "partisan political interests" and "partisan political concerns" are we must first answer the more general question of what political parties and politicians as such are interested in, or concerned with, generally speaking. Quite obviously, on the one hand, they are concerned with party organization, fund raising, planning campaign strategy and other strictly partisan matters. But these interests or concerns pertaining exclusively to partisan organizations may not constitutionally be the basis for patronage dismissals. *Elrod*, 417 U.S., at 362. However, political parties and politicians are also principally concerned with public policy. Each election year they present to the electorate a political program which is partisan in the sense that it represents the goals and views of a particular party concerning government and its administration. When that party is elected, its partisan goals and views become the goals and views of the government, that is government or public policy, and those called to define more precisely and to implement those goals are, in that certain sense, formulating and implementing partisan goals.

It is in this sense, therefore, that partisan interests or concerns and party affiliation are relevant to policymaking and confidentiality in the performance of a particular government position: to the extent that a government official is directly or indirectly involved in the formulation or implementation of government public policy, as is respondent,

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[11] This Court has warned that insubstantial law suits against high level government officials must be discouraged. *Mitchell* v. *Forsyth*, 472 U.S. , 86 L.Ed.2d 411, 105 S.Ct. 2806 (1985). A narrow reading of the *Elrod-Branti* exception like the First Circuit's promotes such litigation, not by employees placed in the lower end of the spectrum, but by substantial policymakers, as shown by the experience in Puerto Rico. See note 8, supra.

his position is related to "partisan political interest or concerns" and must be considered excepted from protection under the First Amendment. Under the *Elrod-Branti* test correctly interpreted, respondent is unquestionably excepted from First Amendment protection.

II. Conflicting approaches among Courts of Appeals and District Courts and the general confusion surrounding the interpretation of the *Elrod-Branti* doctrine require clarification by this Court.

The importance of clear guidelines in this critical area of constitutional law cannot be gainsaid. The interests implicated are the most cherished individual liberties and the core values of the system of government of the United States. On the one hand are the rights of public employees to political beliefs and association guaranteed by the First Amendment and on the other the need for representative democracy to be effectively governed by those chosen by the people.

This area of conflict recurrently requires informed judgment by elected or appointed officials who must implement new government programs. After each election held, a process opens to select the people that will define and implement the general principles sanctioned by the electorate. Thousands of decisions concerning the appointment or retention of public employees are then required at all levels of federal, state, and local governments. For an adequate balance to exist between the competing interests that each of these decisions entails, the fundamental guidelines must be clear. Unfortunately, confusion reigns throughout federal courts concerning the correct interpretation of the *Elrod-Branti* doctrine, particularly as to the exception it recognizes. This "lack of notice as to the scope of First Amendment protection of public employees hinders elected officials seeking to exercise their legitimate power through the control of personnel". *Ecker* v. *Cohalan*, 542 F.Supp. 896, 901 (E.D.N.Y. 1982).

To begin with, several Courts of Appeals and District Courts have differently interpreted the meaning of the *Elrod-Branti* doctrine. The Seventh Circuit, for example, adopted an interpretation that denies protection to policymaking and confidential positions affecting true government, or public, policy. In *Nekolny* v. *Painter*, 635 F.2d 1164,

1170 (7th Cir. 1981), a case involving a senior citizen programs coordinator in a small township, the Court explained that the test is "whether the position held by the individual authorizes ... meaningful input into government decisionmaking on issues where there is room for principled disagreement on goals or their implementation". This standard, all but expressly adopted by the Third Circuit also, see *Brown* v. *Trench*, 787 F.2d 167, 169-170 (3rd Cir. 1986) (involving a county assistant director of public information), has been the basis since *Branti* of considerable case law interpreting its doctrine.

Decisions like *Tomczak* v. *City of Chicago*, 765 F.2d 633 (7th Cir. 1985) (finding the second in command in the agency providing water to a major city excepted); *Soderbeck* v. *Burnett County, Wis.*, 752 F.2d 285 (7th Cir. 1985) (recognizing that a confidential secretary to a small county sheriff would be excepted); *Shakman* v. *Democratic Organization of Cook County*, 722 F.2d 1307 (7th Cir. 1983) (finding the Superintendent of Employment of the Chicago Park District excepted); *Ness* v. *Marshall*, 660 F.2d 517, 521 (3rd Cir. 1981) (finding city solicitor and assistants excepted: "...as a matter of law, the [policymaking] duties imposed on city solicitors [and their assistants] ... define a position for which party affiliation is an appropriate requirement. In relying on an attorney to perform these functions so intimately related to city policy, the mayor has the right to receive the complete cooperation and loyalty of a trusted adviser..."); *Joyner* v. *Lancaster*, 553 F.Supp. 809 (M.D.N.C. 1982) (captain with advisor and planning role in sheriff's office would be excepted); *Ecker* v. *Cohalan* 542 F.Supp. 896 (E.D.N.Y. 1982) (Deputy Commissioner of Parks statutorily substituting for agency head and charged with patronage appointments excepted), are based on the same standard or substantially the same reasoning of *Nekolny*. The emphasis falls on whether "there is room for principled disagreement in the decisions reached by the employee and his superiors, and ... he has meaningful direct or indirect input into the decisionmaking process", *Tomczak*, 765 F.2d, at 641 (citing *Nekolny*). The test is explicitly tied to government decisionmaking and is clearly met by those officials having substantial input into decisions affecting government public policy. Support for this analysis has been found in the "purpose of the policymaker exception ... to ensure that the First Amendment's protection not interfere with the work of government and the ability of

duly elected officials to implement their policies." *Shakman*, 722 F.2d, at 1310. It is the administrative power of the position and its potential impact in government decisions that make the difference.

In contrast with these views are those of the First Circuit which, as explained above, require "a sufficient nexus ... between the position at issue and the kind of policy relating to partisan concerns", App. A10, for the *Elrod-Branti* exception to apply. Under this interpretation, it is not enough to be excepted from protection that a position may advance or obstruct public policy or political objectives by means of the control of agency administration, if responsibilities characterized as "technical and professional" are involved. Officials must be "proconsuls" for agency heads or their areas must be "microcosm[s] of the larger agency", App. A7, if the exception is to apply. The First Circuit's view that a particular position is excepted if it involves "partisan political interests or concerns" or "government decisionmaking on issues where there is room for *political* disagreement on goals or their implementation", *Jiménez-Fuentes*, App. A40 (Emphasis ours), is thus fundamentally different from the Seventh Circuit's.

Respondent's position, for example, was found by the First Circuit not excepted from protection, although it involves substantial authority in decisionmaking concerning areas essential to her agency's ability to function. But, there can be no doubt that under the Seventh Circuit's test, which is satisfied when a position has substantial impact on decisions concerning government operation, her position would have been found not protected. This conclusion is inescapable if *Tomczak* v. *City of Chicago*, supra, is compared to this case. In *Tomczak*, the plaintiff argued precisely that his admittedly high-ranking administrative position involved "mundane" and "ministerial" tasks concerning the repair and rehabilitation of the water system; tasks which might properly be called more "technical" or "professional" than respondent's functions of agency administration, which provide essential support to all agency operations. The Seventh Circuit in *Tomczak*, however, rejected plaintiff's argument and, in fact, it was because he occupied a high-ranking job in a large and vital city department, which included the administration of a large staff and budget, as does respondent's, which suggested to the Court that he was "in a position where his political affiliation could affect the ability

of a new administration to implement new policies". *Tomczak*, 765 F.2d, at 642. Although the First Circuit in *Jiménez-Fuentes* extensively quoted from *Tomczak*, it failed to apply its rationale in the instant case.

Moreover, Justice Powell's prediction, dissenting in *Branti*, has proved to be correct:

> "The standard articulated by the Court is framed in vague and sweeping language certain to create vast uncertainty. Elected and appointed officials at all levels who now receive guidance from civil service laws, no longer will know when political affiliation is an appropriate consideration in filling a position. Legislative bodies will not be certain whether they have the final authority to make the delicate line-drawing decisions embodied in the civil service laws. Prudent individuals requested to accept a public appointment must consider whether their predecessors will threaten to oust them through legal action." 445 U.S., at 524.

Numerous decisions of the Courts of Appeals demonstrate this uncertainty. The Court of Appeals for the Third Circuit, for example, has complained that "[g]uidance from the Supreme Court as to when party affiliation may be 'appropriate' is limited to the facts of the *Branti* case and to a few examples offered by Justice Stevens in his *Branti* majority opinion." *Ness* v. *Marshall*, 660 F.2d 517, 520 (3rd Cir. 1981). A Judge of that Court criticized the existing formulation of the doctrine stating, among other things, that: "the various majority opinions in both *Elrod* and *Branti* are not capable of public comprehension." *Loughney* v. *Hickey*, 635 F.2d 1063, 1069 (3rd Cir. 1980) (Aldisert, Judge, concurring). See also *Brown* v. *Trench*, 787 F.2d 167, 169 (3rd Cir. 1986) (stating that "while *Branti* provides us with a 'test' the Supreme Court has not specified the particular factors which indicate that a position falls within the *Branti* test"). The First Circuit, after referring to the "skeletal teachings of *Elrod* and *Branti*" has insisted that "[i]dentifying generic categories of positions where partisan selection and rejection are permissible has, as we have seen, proven to be an elusive and intractable task." *Jiménez-Fuentes*, App, A38, A40. See also *De Abadía* v. *Izquierdo Mora*, 792 F.2d 1187,

1191 (1st Cir. 1986) (stating that the *Branti* test "is much easier to say than to apply to the wide number of factual situations bound to occur in any government employing a large number of individuals").

The Seventh Circuit, in a post-*Branti* decision has recalled "Justice Powell's admonition in *Elrod* that formulating standards for some patronage practices may be difficult." *Shakman* v. *Democratic Organization of Cook County*, 722 F.2d 1307, 1310 (7th Cir. 1983). Disagreements have been found even as to positions where the plaintiff did not argue the question of the exception on appeal: See *Grossart* v. *Dinaso*, 758 F.2d 1221 (7th Cir. 1985), where two judges implied that under certain circumstances the plaintiff, essentially a financial clerk light-years removed from a position like respondent's, could under certain circumstances be excepted, id., at 1227, n. 3, while another "would have thought [her] either a policymaking ... or a confidential employee, or both, who could be fired for her politics", *id*, at 1235 (Posner, Judge, dissenting). Further, that Court has described the problems faced by the Courts in applying the doctrine as "increasingly intractable" because "not only do job classifications and personalities vary in each case, but also there are substantial differences between governmental bodies and between individual departments or units within a given governmental body". *Meeks* v. *Grimes*, 779 F.2d 417, 419 (7th Cir. 1985).

And the Fifth Circuit, referring to *Elrod*'s exception to the prohibition of encroachment on employee's rights, expressed its view that: "[W]hen it came to stating the terms upon which such encroachments would be condoned ... its language was such that the reader might have been pardoned for concluding that he stood in the presence of a creature more rare even than the ordinary, garden-variety, compelling state interest." *McBee* v. *Jim Hogg County*, 730 F.2d 1009, 1011 (5th Cir. 1984). The lack of adequate guidelines even required the Seventh and Eighth Circuits to consider if such low level employees as court bailiffs and road-graders are excepted from protection under "small office" and "alter ego" theories of exception that to some may comply with the political-affiliation-as-an-appropriate-requirement test. *Meeks* v. *Grimes*, supra (remanding for further findings); *Horton* v. *Taylor*, 767 F.2d 471 (8th Cir. 1985).

Decisions of the District Courts also illustrate the confusion surrounding the *Elrod-Branti* standard. See *Gannon* v. *Daley*, 561

F.Supp 1377, 1383 (N.D. Ill. 1983) (referring to the "vagueness of the Branti standard"); *Ecker* v. *Cohalan*, 542 F.Supp. 896, 901 (1982) (stating, after *Branti*, that there is "no simple standard for determining what positions in local government may be legitimately staffed on a partisan basis"); *Visser* v. *Magnarelli*, 530 F.Supp. 1165, 1173 (N.D.N.Y. 1982) ("because *Branti* formulated its test in such nebulous language..."); *Brunton* v. *United States*, 518 F.Supp. 223, 238 (S.D. Ohio, E.D. 1981) (referring to "the standard's ambiguity, breadth, and difficult application"); and *Garreto* v. *Cooperman*, 510 F.Supp. 816, 819 (S.D.N.Y. 1981) (holding *Branti* standard to be dictum).

Finally, decisions by the Fourth and Fifth Circuits even differ on the question of the kind of situations to which the *Elrod-Branti* doctrine is applicable. In *Jones* v. *Dodson*, 727 F.2d 1329 (4th Cir. 1984), the Court effectively held that the doctrine is applicable only in situations where party affiliation alone is the cause of discrimination. 727 F.2d, at 1336. If any "overt speech activity" whatsoever is involved, the balancing test of *Pickering* v. *Board of Education*, 391 U.S. 563 (1968) would be applicable. 727 F.2d, at 1335 n. 6. Under this reasoning, the First Circuit's decision in *Jiménez-Fuentes* would not have been possible under the test of *Elrod* and *Branti*, since the plaintiffs therein were found to be active political participants in the electoral campaign that eventually led to their dismissal. App. A35 and n. 2. The Fifth Circuit, on the other hand, in *McBee* v. *Jim Hogg County*, 730 F.2d 1009 (5th Cir. 1984), has recently put together the differing tests set forth in *Pickering* and *Elrod* into just one ad hoc balancing inquiry which the Court considers necessary in view of this Court's decision in *Connick* v. *Myers*, 461 U.S. 138 (1983).

In short, confusion and frustration among the courts, unquestionably affecting also government decisionmakers and other concerned parties,[12] characterize the aftermath of *Branti* in this critical area of

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[12] A substantial body of commentary also shows the prevailing confusion. See, for example, Holloway, W. and Leech, M. J., *Employment Termination-Rights and Remedies*, B.N.A. 1985, p. 181 (arguing that the *Branti* test "is less precise than the test proferred by the *Elrod* court", because "[n]o guidelines were suggested for making the determination"); Note, *Politics and the Non-Civil Service Employee: A Categorical Approach to First Amendment Protection*, 85 Columbia L. Rev. 558, 565 (1985) (the "contrasting approaches [of two Fourth and Fifth Circuits decisions]

the law. The First Circuit's decision in this case, finding a top-ranked policymaking government official, substantially involved also in confidential and spokesperson duties, within the general rule of the *Elrod-Branti* doctrine, on the basis of the Court's characterization of her duties of agency administration as "technical and professional", now aggravates the quagmire in which the doctrine already found itself.

The root and the cause of these widespread problems of interpretation and application of the doctrine by federal courts is the absence of guidelines in *Branti* to determine when a particular position may be considered political. The *Branti* standard that a position is excepted from protection "when party affiliation is an appropriate requirement for the effective performance of the public office involved", 445 U.S., at 518, is excessively broad and general to allow the courts, agency heads and other concerned parties, like individuals asked to accept or leave government jobs, to identify an excepted position with reasonable certainty. Imprecision, vagueness, unspecificity, and ambiguity, are in the opinion of most courts, as shown before, the concepts best defining the *Branti* test.

The decision in the instant case, in the context of judicial doubt and confusion described above only reinforces the need for this Court's intervention to clarify a rule on whose importance one may not insist too much. That substantial body of judicial decisions after *Branti* demonstrates that this Court must establish subordinate criteria to its general formulation or substandards that will allow lower courts to apply both the general rule and the exception to

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suggest that there is considerable conceptual confusion in this area of First Amendment doctrine"); Note, *Consideration of Administrative Loyalty in Identifying Positions Exempt from the Shakman Decree*, 17 Loyola University Law Review 119, 144 (1985) ("The subsequent refinements of the *Elrod* test have produced an uncertainty which invites inconsistent application and precludes the establishment of guidelines which might assist employers and employees prior to litigation"); Note, *First Amendment Limitations on Patronage Employment Practices*, 49 University of Chicago Law Review 181, 188, n. 47 (1982) (the *Branti* illustrations "provide little guidance to lower courts charged with implementing the new standard"); Note, *Constitutional Limitations of Patronage Practice: Branti v. Finkel*, 42 Louisiana Law Review 310, 319 (1981) ("One may question whether the Court succeeded in setting forth a less vague and uncertain test or merely exchanged one uncertain test for another").

effectively balance and accommodate the conflicting interests involved in each decision. For example, a public official's rights to political belief must be protected but, what factors in his background of political or government activity, like substantial identification with a previous program or administration, may be taken into consideration to afford or deny First Amendment protection at the time of a particular employment decision? Further, excepted positions must be identified according to the purpose of the exception but, what factors determine the extent to which an official must be able to obstruct government policy in order to be excepted? In sum, comprehensive criteria for determining when a position is political must be established to make possible that determination. Relative weights must be awarded to each factor to determine their comparative importance. These subordinate standards will undoubtedly help to minimize the difficulties encountered by the lower courts in the interpretation and application of the *Elrod-Branti* doctrine.

This is not an easy task. The difficulty "is the natural product of the fact that, not only do job classifications and personalities vary in each case, but also there are substantial differences between governmental bodies and between individual departments and units within a given governmental body". *Meeks* v. *Grimes*, 779 F.2d, at 419. The fact that each decision involves "a rough balance between governmental efficiency, political reality and individual liberty" makes the selection of criteria only more difficult. Thus, the difficulties of establishing more precise standards may not be minimized.

In fact, given the extraordinary number of fundamentally different situations, a reasonable definition of factors for general application to all cases might not be possible. As happened in *García* v. *San Antonio Metro. Transit Authority*, 105 S.Ct. 1005 (1985), with the standard of "traditional governmental functions" the conclusion could be that the standard is unworkable. As in *García*, examples were supplied with the standard examined here, but a general explanation of how to arrive at the fundamental decision was lacking, 105 S.Ct., at 1007. The same as there, here it is "difficult, if not impossible, to identify an organizing principle that places ... cases ... on one side of a line and ... cases ... on the other side". *Id.*, at 1011. Although "it normally might be fair to venture the assumption that case by case development would lead to a workable standard",

id., at 1012, the experience with the *Elrod-Branti* doctrine over a substantial number of years has been absolutely unsatisfactory. If the present standard may not be reasonably made suitable for future application to the myriad of conceivable possibilities, it would be appropriate to reconsider the standard itself and either discard it completely or substitute it for another, more amenable to coherent application.

CONCLUSION

The decision of the Court of Appeals in this case completely frustrates the purpose of the exception to First Amendment protection in employment for public officials. If allowed to stand, it will afford protection to a substantial number of powerful public employees who may obstruct the policies of a new administration. Moreover, the Court's decision adds to the already existing confusion among federal courts in the interpretation and application of the *Elrod-Branti* doctrine. This Court's intervention is required, not only to correct the rule adopted in this and its companion case for the First Circuit, but to clarify, or reconsider altogether, *Branti*'s reformulation of the standard first established in *Elrod*.

Respectfully submitted,

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December 18, 1986

FILED
DEC 17 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-1022

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

THE GOVERNMENT DEVELOPMENT BANK FOR PUERTO RICO; JOSE RAMON GONZALEZ, INDIVIDUALLY AND AS PRESIDENT OF THE GOVERNMENT DEVELOPMENT BANK FOR PUERTO RICO; JUAN AGOSTO ALICEA, FRANCISCO DE JESUS TORO, ANTONIO J. COLORADO, RUBEN VELEZ LEBRON, GILDO MASSO, EDUARDO ROVIRA AND DIEGO SUAREZ, EACH INDIVIDUALLY AND AS MEMBERS OF THE BOARD OF DIRECTORS OF THE GOVERNMENT DEVELOPMENT BANK FOR PUERTO RICO

Petitioners,

v.

ZAIDA LYDIA DE CHOUDENS,

Respondent.

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

APPENDIX TO PETITION FOR CERTIORARI

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73 pp

APPENDIX

TABLE OF CONTENTS

Page

APPENDIX A

Judgment of the Court of Appeals for the First Circuit . A1

APPENDIX B

Opinion of the Court of Appeals for the First Circuit, entered September 19, 1986, as amended September 24, 1986 ..... A2

APPENDIX C

Opinion and Order of the District Court for the District of Puerto Rico, entered December 27, 1985, as amended February 5, 1986 ..... A12

APPENDIX D

Preliminary Injunctive Decree issued by the District Court for the District of Puerto Rico, entered December 27, 1985 ..... A30

APPENDIX E

Opinion of the Court of Appeals for the First Circuit in *Jiménez-Fuentes, et al.* v. *Torres-Gaztambide, et al.*, No. 85-1655, Slip op. (1st Cir. September 19, 1986) ... A32

APPENDIX F

Puerto Rico Public Personnel Act, Sections 5.9 to 5.11, as amended, 3 L.P.R.A. 1349 to 1351 ..... A62

APPENDIX G

Personnel Regulations for Managerial Employees approved by the Government Development Bank for Puerto Rico, as amended (translation) A64

APPENDIX H

Organization Chart of the Government Development Bank for Puerto Rico A67

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 86-1059

ZAIDA LYDIA DE CHOUDENS, ET AL.,
Plaintiffs, Appellees,

v.

THE GOVERNMENT DEVELOPMENT BANK
OF PUERTO RICO, ET. AL.,
Defendants, Appellants.

JUDGMENT

Entered: September 19, 1986

This cause came on to be heard en banc on appeal from the United States District Court for the District of Puerto Rico, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the district court issuing a preliminary injunction is affirmed.

By the Court:

FRANCIS P. SCIGLIANO, CLERK.

By _____
/s/ Richard W. Gordon
Chief Deputy Clerk

APPENDIX B

Zaida Lydia De CHOUDENS, et al.,
Plaintiffs, Appellees,

v.

The GOVERNMENT DEVELOPMENT BANK
OF PUERTO RICO, et al.,
Defendants, Appellants.

No. 86-1059.

United States Court of Appeals,
First Circuit.

Sept. 19, 1986

As Amended Sept. 24, 1986.

Before CAMPBELL, Chief Judge, COFFIN, BOWNES, BREYER and TORRUELLA, Circuit Judges.

COFFIN, Circuit Judge.

Plaintiff-appellee Zaida Lydia De Choudens claims she was demoted from her government position on the basis of her political affiliation in violation of her first amendment rights. *See Branti v. Finkel*, 445 U.S. 507 (1980); *Elrod v. Burns*, 427 U.S. 347 (1976). In this companion case to *Torres Gaztambide v. Jimenez Fuentes*, No. 85-1655, slip op. (1st Cir. Sept. 19, 1986), we decide whether political affiliation was an appropriate requirement for plaintiff's position.

In both cases, federal district judges in the District of Puerto Rico had granted preliminary injunctions, requiring the

reinstatement of the plaintiffs to their governmental positions.[1] The plaintiffs, members of the Partido Nuevo Progresista (PNP), had been removed from their positions by officials from the Partido Popular Democratico (PPD), which won the November 1985 general election. In *Jimenez Fuentes*, we reversed the issuance of an injunction, concluding that the position at issue (regional director of a housing agency) resembled one where, because it involved policymaking, confidential, and spokesperson functions in an area responsive to a party's governmental goals, political affiliation was an appropriate requirement. In this case, we affirm the district court's grant of a preliminary injunction because, although the position at issue involves policymaking, the reposing of confidence, and communicating, we presently conclude that such functions are so remote from advancing or thwarting the agency's partisan-responsive goals that political affiliation would not be considered an appropriate requirement.

I.

Plaintiff served in the Puerto Rico Government Development Bank (Bank) for over twenty years. She rose from the position of accountant through eight career-level positions to Senior Vice President of the Finance Area. She was one of the three vice presidents, serving under the President and Executive Vice President. After the new administration assumed power in January 1985, defendant-appellant Jose Ramon Oyola[2] was appointed president of the Bank. In April 1985, Oyola notified plaintiff that she was being "separated" from her position of trust and reinstated to a career position.

II.

Defendants claim that the district court abused its discretion in finding that plaintiff had shown a likelihood of success on the merits. Although they do not concede that plaintiff was transferred for political reasons, they do not challenge that finding.

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[1] After the court voted to vacate the original panel decision in *Jimenez Fuentes* and hear that case en banc, we voted to hear argument in this case en banc at the same session, without the assistance of a panel decision.

[2] The other defendants-appellants are the Bank and its seven directors.

They do challenge the district court's findings that the plaintiff would not have been transferred but for her political affiliation, and that her position was not one for which political affiliation was appropriate. We address these asserted errors in turn.

As in *Jimenez Fuentes*, we preface our discussion by noting that our standard of review is whether the issuance of the injunction constituted an abuse of discretion, *id*: at 3, and that our conclusions at this juncture are to be understood as statements as to probable outcomes, *id*. at 4.

A.

[1] The first issue is whether the district court abused its discretion in ruling, pursuant to *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1974), that defendants failed to show that they would have demoted plaintiff notwithstanding her political affiliation. *See Rosaly v. Ignacio*, 593 F.2d 145, 149 (1st Cir.1979). Defendants on appeal face an uphill task because their sole witness was Oyola, the new PPD president of the Bank. Although they introduced much documentary evidence, their *Mt. Healthy* defense rested upon Oyola's credibility.

Oyola stated that he demoted plaintiff because he deemed her incompetent, providing four reasons for his conclusion. First, she had "very bad" relations with the personnel she supervised, based on comments made by union officials. But Oyola spoke of these comments in conclusory terms, and did not know the eventual outcome of the complaints against her. In fact, the few grievances carried to a conclusion largely, if not completely, vindicated plaintiff and the Bank. A union resolution censoring plaintiff may well have arisen from an institutional position taken by the Bank in its labor negotiations.

A second proferred reason was inadequate internal controls in the food stamp division, which made possible a substantial theft of food stamps by several employees who were later convicted. While some audit reports were critical of various Bank procedures, commendations later followed, and it was plaintiff herself

who apparently instituted the lengthy investigation that lead to the apprehension of those responsible. Moreover, the district court might well have been skeptical of this reason in light of the fact that the official (a PPD member) in direct charge of the food stamp operation at the time of the thefts was assigned plaintiff's duties after her removal.

A third ground was plaintiff's alleged delinquence in failing to supply enough accounting personnel to service a high-risk private loan program. But evidence showed that plaintiff recognized the problem and obtained temporary outside help. Oyola's fourth and final reason for demoting plaintiff was that she had failed to put into operation a computerized loan-administration system. Although the needed software had been acquired but was not in use, the court found that employees in a division outside the plaintiff's area had not yet developed the files or technique to use it.

In addition to considering the conflicting evidence and inferences relating to the four proffered reasons for demoting plaintiff, the district court was entitled to take into account the following circumstances. Shortly after Oyola took office, the new Secretary of Justice asked to see all files of employees in positions of confidence, including plaintiff's.[3] Subsequently, the Secretary reported his belief that all were indeed positions of confidence, removable at will. Notwithstanding this report, Oyola stated that he removed the three Senior Vice Presidents because of their incompetence. He professed not to know that they were PNP members. Moreover, at no time during the two months preceding plaintiff's demotion did Oyola talk with her or her supervisors about her work or its shortcomings.

In short, we cannot fault the court for finding Oyola not credible. And the various documents are not so clear and compelling as independently to make the case against plaintiff. We therefore find that the district court did not abuse its discretion in finding that plaintiff would not have been demoted "but for" her political affiliation.

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[3] Plaintiff's position was a confidential position under the Puerto Rico Public Service Personnel Act of 1975, 3 L.P.R.A. § 1301 et seq. (1978). *See Jimenez Fuentes*, slip op. at 22-23.

B.

[2] Defendants' remaining basis for prevailing on this appeal is their argument that the district court abused its discretion in holding that defendants failed to meet their burden, under *Elrod* and *Branti*, of showing that political affiliation is an appropriate requirement for the position at issue. Rather than recite again our observations as to the relevant authorities and our resulting guidelines of analysis, we rely on our opinion in the companion case, *Jimenez Fuentes*. We do find, however, one proposition worth repeating:

"A threshold inquiry, which derives from *Branti*, involves examining whether the position at issue, no matter how policy-influencing or confidential it may be, relates to 'partisan political interests....[or] concerns.' 445 U.S. at 519. That is, does the position involve government decisionmaking on issues where there is room for political disagreement on goals or their implementation. Otherwise stated, do party goals or programs affect the direction, pace, or quality of governance."
Jimenez Fuentes, slip op. at 12.

We begin by scrutinizing the Bank itself. Although the district court focused primarily on plaintiff's position in the Bank, it did note the Bank's role as advisor and fiscal agent of the government of Puerto Rico. The court commented on the Bank's need for continuity of organization (fostered by the directors' staggered four-year terms), as well as its need for financial stability and strength. It stated that "to subject this financial institution to the influence peddling and cronyism that patronage brings will erode its very foundation." This was dictum, unnecessary to the court's determination that political affiliation was an inappropriate requirement for plaintiff's position, and we think probably overbroad as applied to the other, more politically-sensitive positions at the Bank.

As of 1984, the Bank had nearly four billion dollars of assets, and some three hundred employees. Its three primary functions are: fiscal agent and financial advisor to the Commonwealth and its Governor, its agencies, municipalities, and public corporations; lender to government and private industry; and depository of Commonwealth funds. The Bank's Annual Report spoke of its

"Group," including its subsidiaries and affiliates, as providing "leadership in promoting renewed economic growth"; a "multifaceted, yet coordinated approach to development, which, during fiscal 1984, emphasized commercial, industrial, agroindustrial, tourism, and human resource development"; increased allocations of loans to encourage new investment in hotels, to spur agricultural exports and manufacturing; and a redirection of the Puerto Rico Development Fund to serve small business. Oyola, representing the new administration, testified that he had been given "a clear policy direction ... to create a Development Bank out of the [Bank]" to engage in innovative private financing of each and every organization of the Commonwealth of Puerto Rico.

To us, these seem like indicia of legitimate partisan goals for government operations, not far removed from some of the policy objectives of CRUV discussed in *Jimenez Fuentes*. This, however, need not detain us long for there remains the critical inquiry: even assuming that the Bank's strategic leadership positions are ones for which political affiliation is an appropriate requirement, is plaintiff's position within this group? Defendants, of course, most emphatically endorse the concept of the Bank as an instrument of public policy responsive to a new administration's economic development goals and underscore the district court's statement that it had "no quarrel with [defendants'] contention that [plaintiff] is a policymaker and has access to confidential information within the bank." This, to defendants, is the end of the quest.

So it was in *Jimenez Fuentes* where plaintiffs, regional directors of a public housing corporation, were top "line officers" or proconsuls for their agency within their region, representing the agency in all respects. Each region was a microcosm of the larger agency, and the duties of each regional director were representative of the duties of the agency's executive director. The instant case, however, presents us with a staff official who, while indubitably in a policymaking, confidential, and communicative position, is both empowered and constrained by the limits of her specialized functions. Because her division is not a microcosm of the larger agency, it is insufficient to show that she is a

policymaker for a Bank that involves partisan political concerns. *Elrod* and *Branti* require us to examine whether political affiliation is an appropriate requirement for plaintiff's particular position.

We now paraphrase the district court's findings, which we find amply supported, regarding the plaintiff's position. Plaintiff heads one of the Bank's three main operation areas, the Finance Area, the other two divisions being the Investment, Treasury and Public Financing Area and the Private Financing Area. The Finance Area's main function is the offering of accounting services to the Bank's other areas and dependencies. It keeps accounting records on the Bank's operations and services other government agencies' accounts with the Bank. It also acts as advisor to government agencies on accounting matters.

Within the Finance Area are: the Controller Division, which maintains and updates the Bank's internal systems and procedures to ensure that there are adequate internal controls acceptable to outside examiners; the Budgeting and Control Division, which examines the Bank's proposed disbursements to ensure that they are made in accordance with the approving authority; the Fiduciary Unit, which monitors the payment of the central government of Puerto Rico's public debt and maintains accounting records for the central government's sinking fund; the Accounting Division, which maintains accounting records of the public and private sector loans and prepares monthly and annual statements; the Current Accounts Division which is in charge of the Secretary of the Treasury of Puerto Rico's account and the payment of central government checks issued by that department and other agencies; the Government Accounts Service Division, which complements the Currents Account Division in serving all government accounts; and the data processing activities, which include three divisions responsible for all the computerized data services.

As Vice President of the Finance Area, plaintiff was in charge of planning, coordinating, directing, and supervising these divisions. She was also a member of the Bank's Loan Committee and she sometimes acted as interim President. Plaintiff testified that she gave advice to the President and the Board of Directors on financial matters within her area.

Keeping in mind the district court's findings of an admittedly broad range of duties, we have scrutinized defendants' brief and record references for evidence of the relationship between plaintiff's position and those strategy decisions that the leadership of the Bank might make in response to a new governor's administration in Puerto Rico. Defendants cogently point to the broad discretion lodged in the Senior Vice President for the Finance Area, the power to make rules and recommend reorganization, the oversight of accounting policy, a contribution to investment strategy, budget and personnel recommendations, and software advice. While these responsibilities signify a position of substance, of valued policy contributions, recommendations, and advice, they involve politically-neutral, technical, and professional matters. Similarly, though plaintiff was indeed an agency spokesperson, there is no suggestion of any "party line" or political, goal-oriented message that she ever communicated.

What did pique our interest was the power, delegated on occasion, of plaintiff to act as president of the Bank, because this responsibility might overleap the normal technical boundaries of plaintiff's position. Our review of the record reveals only the following occasions when she acted as president: when the President informed her of the Bank's position; when she made no decision; when she commenced the budget presentation to the Board of Directors because the President was late; when she gave a technical reason to the Board for holding up a loan disbursement;[4] and when she acted only after calling the President for instructions.

In order to carry their burden of demonstrating the politically-sensitive nature of the position at issue, defendants relied on Oyola to identify where and how a person in plaintiff's position might help or hinder the pursuit of the Bank leadership's strategic goals. He stated that the Finance Area was the most

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[4] The background of this presentation was that the Board of Directors had passed two or three resolutions regarding the loan in question. Technical difficulties had arisen, and it was not clear that the Board wished to take a second-mortgage position subordinate to a private bank. Plaintiff could not discern the Board's intent from the minutes and "had to go back to the board and ask them." This indicates to us the dominant policymaking status of the Board on approving loans and the purely technical role of plaintiff's position.

important of the Bank's three areas for the "internal work" of the Bank to ensure "the proper flow of work." He added that it was important "to have the same views of what the accounting system should be...." Not only did Oyola admit that he did not know what plaintiff's ideas were on such matters, but it seems clear to us that however broadly "partisan" may be defined, it cannot encompass these technical, professional criteria. And, although defendants allude to plaintiff's part in administering the loan portfolio, Oyola's testimony reveals that plaintiff's involvement consisted of accounting advice.

The district court concluded:

> "The area which plaintiff previously directed is precisely that part of the institution entrusted with safeguarding its bank operations in the strict sense of the word. The Finance Area is essentially a provider of accounting services and technical, financial information to give other areas of the Bank the necessary input to make their decisions. Whatever characteristics of plaintiff's former position could arguably be related to a partisan political interest are so insubstantial when considered in the context of her overall functions that they do not outweigh her First Amendment right to political affiliation."

At this juncture, based on the evidence before the district court, we cannot find any abuse of discretion. We recognize the closeness of a case involving the political firing of a top policymaking official in a public agency. It may well be that in any further proceedings on a permanent injunction a sufficient nexus will be drawn between the position at issue and the kind of policy relating to partisan concerns. At the moment, however, we cannot fault the district court for not seeing it.

The district court's issuance of a preliminary injunction is affirmed.

TORRUELLA, Circuit Judge (concurring).

Although I agree with the conclusion of this appeal, to the extent that it relies on the reasoning of the *en banc* opinion issued today in *Jiménez Fuentes, et al. v. Torres Gaztambide, et al.*, No. 85-1655, slip op. (1st Cir. Sept. 19, 1986), I cannot but concur in its outcome. I also am in disagreement with the *en banc* attention given to this case *sans* the normal procedure of panel consideration having been previously accorded. I see nothing in this case which warrants such expedited treatment.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

ZAIDA LYDIA DE CHOUDENS, and the conjugal partnership composed of DE CHOUDENS, ZAIDA LYDIA and MARRERO, MIGUEL A. Plaintiffs	)	
vs	)	
THE GOVERNMENT DEVELOPMENT BANK OF PUERTO RICO; OYOLA, JOSE RAMON, individually and in his representative capacity as PRESIDENT OF THE GOVERNMENT DEVELOPMENT BANK OF PUERTO RICO; AGOSTO-ALICEA, JUAN, individually and in his representative capacity as CHAIRMAN OF THE BOARD OF DIRECTORS OF [THE GOVERNMENT DEVELOPMENT BANK OF] THE COMMONWEALTH OF PUERTO RICO; DE-JESUS-TORO, FRANCISCO; COLORADO, ANTONIO J.; VELEZ-LEBRON, RUBEN; GARCIA-MENDEZ, MANUEL; ROVIRA, EDUARDO and SUAREZ, DIEGO each individually and each in his representative capacity as DIRECTOR OF THE GOVERNMENT DEVELOPMENT BANK OF PUERTO RICO Defendants	)	CIVIL 85 - 1187CC

AMENDED OPINION AND ORDER

Once again the Court confronts the issue of whether a public employee's First Amendment rights to political affiliation and belief are violated by an unconstitutional patronage practice in employment.

Zaida Lydia de Choudens, an employee of the Government Development Bank of Puerto Rico (the Bank) since 1965, claims that her demotion from the position of Senior Vice-President of the Finance Area and the resulting annual salary reduction of $14,000.00 was prompted by the fact that she is not a member of the political party that won the 1984 general election in Puerto Rico.[1] Her verified complaint for damages and injunctive relief is directed against the Bank, its President, José Ramón Oyola and the seven members of its Board of Directors in their individual and representative capacity. They contend that she was not demoted because of her political beliefs and that, if she was, her position was one where political affiliation was an appropriate requirement. A preliminary injunction hearing was held on her request to be reinstated to her position as Senior Vice-President, Director of the Finance Area of the Bank, and on her petition that all defendants be enjoined from discriminating against her for the exercise of her political beliefs. Extensive evidence, testimonial and documentary, was presented by both parties and post-hearing briefs were simultaneously filed.

A substantial credibility factor permeates the issues of whether her demotion was politically motivated and whether, regardless of any such motivation, she would have been removed anyway for other reasons. We shall analyze the different legal arguments discussed by the parties within the factual framework of this case.

Plaintiff's career at the Government Development Bank of Puerto Rico dates back to August 1965 when she was hired to fill

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[1] Plaintiff also claims that her demotion violated her due process rights for bank regulations were allegedly amended retroactively depriving her of an acquired property interest. Evidence related to this was presented during the preliminary injunction hearing only in relation to her First Amendment claim and was not analyzed separately.

the position of Accountant I to handle simple loans. Two years later she became Accountant II handling industrial loans. Approximately two years later she became investment accountant in charge of accounting records of investments made by the bank. In 1970, she was transferred to the Loan Analysis Division of the Bank as Loan Analyst II to work in the analysis of loan applications from private enterprises. As of April 1, 1971, the position of Loan Analyst II was reclassified as Loan Analyst IV, a superior level of loan analysis that considered applications of a more complicated nature. From July 1, 1972 until January 1, 1974, she served as Sub-Director of the Loan Analyst Division. At this time her monthly salary had increased from her starting salary of $350 in August 1965 to $1,408.33. In June 1974, she became Assistant Vice-President in the Loan Department. In this position she was in charge of reviewing reports that were prepared by the different loan analysts in relation to loan applications which would then be presented to the Board of Directors or to the Loan Committee. In 1975 she was transferred to the Fiscal Agency Department as Assistant Vice-President in charge of reviewing and analyzing the petitions for financing of the different governmental agencies. She remained in that position until February 17, 1977 when she was designated Bank Controller by Mr. Mariano Mier, President of the Bank, upon the recommendation of Mr. Gustavo Doble, one of the defendants' witnesses and a former controller who at the time was serving as Director of Administration. The evaluations by Mr. Doble from the period of February 1977 through January 1978 concerning the quality of plaintiff's performance were all excellent as to quality and quantity of work, judgment, initiative, reliability and relations with her supervisors and coworkers. In 1978, Mr. Doble retired as Senior Vice-President of the Area of Administration and was substituted by plaintiff. Prior to this promotion, all the jobs she had held were career positions. In 1981, the Area of Administration was reorganized and renamed Area of Finance after the Personnel Division and the Division of Administrative Services were eliminated and set up as separate divisions. She served as Senior Vice-President of the Area of Finance until April 16, 1985 when she was demoted from that position by Mr. José Ramón Oyola, the new Bank President.

During her twenty years at the Bank plaintiff performed her duties in an efficient and outstanding manner, under different political administrations and in different divisions. She worked her way up from the lowest level to a high management position through her effort, expertise and talent. Throughout these years, she accumulated valuable experience in multiple bank operations. Her personnel record is replete with praise on her performance and there are letters of commendation. All officers of the Bank who testified during the hearing have known and worked with plaintiff for years. These witnesses included two former Presidents, an Executive Vice-President, a former Director of the Area of Administration and the present Controller and Acting Director of the Finance Area. They all agreed that she was an excellent public servant. In 1975, top management officials who came to the Bank at the request of the Governor Rafael Hernández-Colón to handle a crises in the public financing department chose Zaida Lydia de Choudens, considered one of the stars of the Bank in that department, to strengthen that area. Former President Julio Pietrantoni described that situation as the worst financial crisis the Bank had ever gone through.

Notwithstanding that she was highly qualified and had an excellent record, the new President removed her from her position in April 1985, without stating any reason other than that she was an employee of trust. Oyola had been appointed a month before by newly elected Governor Rafael Hernández-Colón, who assumed the duties of his office in January 1985, after his party, the Popular Democratic Party, won the general election in November 1984. Oyola testified that he was a member of the Popular Democratic Party and had previously served as an advisor to Popular Democratic Party Senator Miguel Hernández-Agosto. As the new President of the Bank, one of the first tasks he undertook was to send the personnel files of all trust employees to the Secretary of Justice, upon the latter's request. Soon thereafter, the ax fell on the heads of several bank officials who held positions of trust and on a career employee whose appointment was declared null. All of these persons belonged to the New Progressive Party, the party previously in power which had lost the election to the Popular Democratic Party. There is no

evidence that bank employees who were identified with the Popular Democratic Party were either discharged or demoted after the bank received the opinions of the Secretary of Justice and action was taken against employees affiliated with the New Progressive Party.

Another action taken by Mr. Oyola in these first days of his incumbency, was to request and recommend to the Board of Directors that Section 2.7 of the Bank's personnel regulations be amended to strike the provision which entitled a trust employee reinstated to his former career position to continue receiving the same salary he had earned while occupying the confidential position. Mr. Oyola had sought legal advice from attorney Lino Saldaña and the Secretary of Justice on the validity of this amendment. In an opinion dated March 4, 1985, the Secretary stated that the amendment contemplated ought to apply only prospectively since the employees had acquired rights which could not be affected. Attorney Saldaña, who favored the amendment, submitted to Mr. Oyola a draft of the resolution which was presented to the Board of Directors and finally adopted. The proposed resolution prepared for Mr. Oyola by Attorney Saldaña and the final resolution of the Board are identical. Mr. Oyola also made extensive consultations to the Secretary of Justice and to attorney Lino Saldaña regarding Mrs. De Choudens' rights with respect to possible positions that she could hold in the Bank. A few weeks later Zaida Lydia de Choudens was summarily removed from her trust position and reinstated to a lower echelon career position by the new President, who did not find it necessary to meet with her or her supervisors to discuss her performance, prior to her demotion. As a result of the Board's resolution Zaida Lydia de Choudens could no longer earn the salary she would have continued receiving as provided in section 2.7 before it was amended. Her new position at the Bank in a subdivision of a different area was less challenging and involved fewer responsibilities. She was not assigned any tasks in this new job until she filed this lawsuit. Plaintiff's former career position had been changed to a trust position and was being occupied by Sarah Rodríguez, who had been recommended to this job by plaintiff. It was also upon Sarah Rodríguez that Dr. Oyola dele-

gated, as of April 17, 1985, all the functions of the Office of Senior Vice-President of the Finance Area. As of the day of the hearing, Sarah Rodríguez held both positions. The record shows that Sarah Rodríguez belonged to the same political party as Mr. Oyola.

The standard dictated by the Supreme Court in *Mount Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1974), has been applied to patronage dismissals in alleged violations of the First Amendment of the United States Constitution. See *Barnes v. Bosley*, 745 F.2d 501, 506-508 (8th Cir. 1984); *Nekolny v. Painter*, 653 F.2d 1164, 1166-1168 (7th Cir. 1981). See also *Jones v. Dodson*, 727 F.2d 1329, 1335 (4th Cir. 1984). According to this standard the initial burden is on the plaintiff to show that her political affiliation was a substantial or motivating factor in the action taken against her. Defendants contend that plaintiff failed to meet this initial burden. Although Oyola denied having knowledge of plaintiff's political affiliation or that he demoted her for her political beliefs, the abundant circumstantial evidence established that in all probability that was the motivating force. Motivation because of its subjective elements can rarely be proved by direct evidence. This situation becomes more obvious in political discharge cases for no employer will openly state so in his dismissal letter. Cf *Jones*, 727 F.2d, at 1335 n.7. ("The *Mount Healthy* procedure for sorting out mixed motives fairly accomodates to the reality that in practically any party affiliation discharge situation some unrelated reason may also be advanced by the employer.") Defendants, nonetheless, argue that they complied with the other leg of the *Mount Healthy* test, that is, that they showed that plaintiff would have been demoted in any event for reasons not related to the exercise of her protected First Amedment right. *Mount Healthy*, 429 U.S., at 287. All reasons advanced by defendants to justify her demotion depend entirely upon Oyola's testimony. The main reason given by Oyola to support his action against plaintiff was her alleged incompetence to fulfill the duties of the position of Vice-President of the Area of Finance. According to him this incompetence was reflected by her inability to maintain a good relationship with the union, her failure to prevent a theft in the

Food Stamp program, her inability to provide proper accounting support to the private Financing Division, and her failure to implement a computerized software system for the administration of private loans.

As to Mrs. De Choudens' problems with personnel, President Oyola's main source of information was the opinion of the former President, Vice-President and Treasurer of the Union. The former Union President José A. Quiñones-Bosch, was appointed by Oyola to Director of the Area of Administration. Oyola also based his conclusion on the "many letters" he stated he found in the Bank's file on Union grievances complaining about Mrs. De Choudens and charging her with violations to the Bank's collective bargaining resolutions. However, a thorough review of these documents has utterly failed to reveal any objective support for this contention. The evidence showed that of the twenty-five alleged violations to the collective bargaining agreement, some of which did not even concern plaintiff directly, only five were filed as grievances and none of these were won by the union. The rest of the "many letters" is a conclusory and self-serving resolution by the union whose President at that time was Mr. Quiñones-Bosch. It should also be noted that since 1981, the area headed by plaintiff until her demotion did not require dealing with the union since the personnel division was separated from that Area. There is also no evidence of any strike or walkout by Bank employees while she held her position of trust. Defendants' evidence on this matter was insufficient to establish that she was ineffective in handling personnel. In any event, any ill feelings or friction between plaintiff and union officials is nothing more that the natural tension inherent between someone representing management and others representing the work force. The only way to eliminate any type of friction between these two competing interests would be to succumb entirely to union demands no matter how unreasonable or harmful to the Bank. It is unfair to now hold plaintiff liable for mishandling union affairs when all the evidence shows that she acted vigorously in defending the best interests of the Bank.

Mr. Oyola concluded that the person ultimately responsible for the theft of food stamps in the Bank was plaintiff. From 1974

to 1982 the Bank was contracted by the Federal Reserve Bank of New York to receive, process and destroy used food stamps in Puerto Rico. In 1982 several Bank employees were arrested and prosecuted for stealing food coupons. This situation was initially suspected two or three years before by plaintiff herself who began noticing that some employees displayed signs of living beyond their means. She alerted President Pietrantoni of the problem and two undercover agents of the Bureau of Criminal Investigation were placed within the Bank. It was only after the Federal Government, who was also investigating the matter, placed hidden cameras in the room where the coupons were destroyed, that the culprits were discovered. Mr. Oyola's testimony on cross reveals that he knew nothing about the details of the theft in the food stamp program. It sufficed for him that someone had stolen coupons to hold plaintiff liable for it. He tried to justify this conclusion urging that the situation had arisen from a lack of internal control reflected by a report of the internal auditor. These reports show that when the program was first implemented there was some mention of a lack of internal controls, as well as expressions of concern related to other operational matters. The evidence shows, however, that steps were taken to remedy this deficiency but that the ultimate solution lay in the employees' attitude towards the program. The reports also show that, in general, by 1981 the program was running smoothly and the Bank's management was commended for their efforts in running the program. What the reports *do not* support is the astronomical leap taken by Dr. Oyola in concluding that the theft was caused by these initial operating deficiencies. In addition, and unknown to Oyola, it should be noted that the person directly in charge of the Bank's food stamps division was none other than Sarah Rodríguez whom he found so competent that she has been assigned plaintiff's tasks in addition to her own. The evidence presented by the defendants related to the food stamp program reveals that once again a situation has been unfairly twisted around to portray plaintiff as an incompetent when her conduct was that of a responsible and concerned public servant.

Dr. Oyola also indicated that plaintiff did not carry out her duties effectively in dealing with the accounting support system

for a series of private loans given by the Puerto Rico Development Fund (the Fund), a subsidiary of the Bank, in 1984. The specific contention was that she did not supply sufficient personnel to provide the accounting services necessary for these new loans. Mr. Oyola assumed that this lack of adequate accounting support system would result in the loss of millions of dollars in loans issued by the Fund during this period. Defendants' position, however, is frivolous. They admit that plaintiff was one of the persons who first recognized this problem as far back as July 1984 when she informed then President Pietrantoni of the need to hire additional accounting related personnel in order to provide the necessary accounting support for these loans. The record shows that, notwithstanding the legal prohibition of hiring personnel at that time because of the November elections, a matter brought to plaintiff's attention by then Personnel Director N. Huertas, they hired outside temporary help which Mr. Oyola admitted continued working at the Bank during 1985 after he became President. In addition, there are documents in the record which show that the lack of sufficient employees to provide the necessary controls to these loans continued well into 1985, after plaintiff had been removed from her position. Defendants have attempted to ascribe to plaintiff the risk of default of these loans on the sheer assumption that she did not provide proper accounting systems when, in fact, she was the person who anticipated the potential problems with the loans and attempted, in the limited circumstances of her position, to remedy this problem by obtaining additional personnel. In sum, defendant Oyola's testimony did not establish, aside from his conclusory statements, that plaintiff was responsible for this shortage of personnel.

The same pattern of conclusory statements characterized Mr. Oyola's testimony on the claimed ineffectiveness on the part of plaintiff in making operational a software system for the Private Financing Area. Of the Bank's seven computer system[s] under her supervision, the only one that was not operating was that of the Private Financing Area. This was due to the fact that, although bought and installed on plaintiff's initiative, the employees of the Private Financing Area did not transfer the necessary information in their files into the system to make it opera-

tional. The Private Financing Area is a division which was not under plaintiff's supervision. This problem in the Private Financing Area was brought to the President's attention by plaintiff. Aside from this, there was little else she could do.

Finally, Mr. Oyola resorted to the proposition that plaintiff would have been removed anyway because he needed persons he could trust who shared his same policies. He took for granted that Mrs. De Choudens did not share his "policies" in relation to the Bank for he admitted on cross-examination that he never asked what her policies were.[2] He also failed to ask her what her policies were on what he referred to as a key area of concern to the new administration, to wit, upgrading the government bonds.[3] Nor did he inquire as to her policies regarding what the accounting system should be, another activity considered by him to be of critical importance. He testified that "[h]e didn't have the time to learn what was going on in the accounting division because [h]e had so many other chores" and that "we never had the time to speak about [her job] because I had so many other things to do." Oyola's transcript at pages 582 and 583. Although she sent him several memoranda, he did not remember their contents nor did he answer any of them. He only spoke to her in the hallways and in the elevator where he said hello and good morning. When confronted by plaintiff's counsel, the only other grounds he could advance to support his lack of confidence on her willingness to follow his policies were the same shallow reasons we have previously rejected.

After reviewing the entire evidence, particularly, Mr. Oyola's testimony, we are left with the bitter taste that this President has done everything in his power to camouflage his real motives for removing a valuable, hard working and loyal public servant. It is apparent to us that practically any reason, no matter how trivial, would have served him well in supporting his claims of incompetence and lack of trustworthiness. Mr. Oyola's testimony lacked credibility and his efforts at tainting plaintiff's well-earned reputation must be censored by this Court. Defendants did not meet

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[2] Oyola's testimony, transcript at page 596.

[3] It should be noted that plaintiff was sent by Oyola to the Public Financing Area which deals precisely with the issuance of government bonds.

their burden in establishing that plaintiff would have been removed anyway for reasons unrealted to her political beliefs.

Having established that her removal was politically motivated, we must examine whether the second tier in First Amendment-patronage dismissal analysis has been met.

In *Elrod v. Burns*, 427 U.S. 347, 373 (1976), the Court held that "the practice of patronage dismissals is unconstitutional under the First and Fourteenth Amendment." The Court in *Elrod*, after discussing the evils of patronage, rejected the many justifications which have been offered for this practice. Advocates of patronage argued that an effective and efficient governmental administration requires that public employees be identified with the in party to avoid potential subversion and apathy on the part of public employees. The Court's answer to this was that the inefficiency resulting from wholesale replacement of public employees every time political office changes belies this justification, that the prospect of dismissal is only a disincentive to good work and that it is unclear that a patronage appointment will bring in a more qualified person, since the appointment is often made in exchange for the delivery of votes and other party service, not job capabilities. The Court expressed doubt that the mere difference of political persuasion could motivate poor performance or ill-willed conduct. The argument that patronage makes employees highly accountable to the public was also discarded. Referring to the availability of merit systems and discharges for cause, the Court found that there are less drastic means which are less intrusive than patronage to achieve accountability in the public workforce. As early as 1949, the Court had spoken out against the "pernicious practice" of patronage. In *United Public Workers v. Mitchell*, 330 U.S. 75, at 97-98, cited in *Elrod*, 427 U.S., 367, the Court observed: "'The conviction that an actively partisan governmental personnel threatens good administration has deepened since [1882]. Congress recognizes danger to the service in that political rather than official effort may earn advancement and to the public in that governmental favor may be channeled through political connections.'" Another interest supposedly ad-

vanced by patronage is the preservation of the democratic process. It was argued in *Elrod* that political parties, central to a democratic system, rely on patronage to survive. The Court rejected this argument stating that the democratic process works just as well, or better, without the practice and that "gain to representative government provided by the practice of patronage, if any, would be insufficient to justify its sacrifice of First Amendment rights." *Id.* 427 U.S. at 370. However, the Court in *Elrod*, recognized a single exception to the constitutional prohibition against patronage. This exception was justified because there exist certain types of positions in public employment where the need for political loyalty of employees to insure effective implementation of policies presumably sanctioned by the electorate outweigh the employee's First Amendment rights. The *Elrod* opinion recognizes this exception as a vital and legitimate governmental interest. *Id.* 427 U.S. at 367 and 372. The Court clearly admonished, however, that "care must be taken not to confuse the interests of partisan oganizations with governmental interests" and that only the latter suffices. *Id.* 427 U.S. at 362. In *Elrod* these exceptional positions were referred to as those held by policymaking or confidential employees and several factors were outlined so as to help the trier of facts determine whether the position was one that implemented policy.

A few years later, the Supreme Court found it necessary to redefine the limited situation where patronage is constitutionally permissible. In *Branti v. Finkel*, 445 U.S. 507 (1980) it rejected the approach suggested in *Elrod* that the ultimate question was whether the position could be labeled "policymaking" or "confidential." The Court expressed that there were positions in which policy could be implemented where partisan concerns were not involved. See *Jiménez-Fuentes v. Torres*, No. 85-1655, Slip Op. at page 5 (1st Cir. Dec. 20, 1985). The test formulated in *Branti* is not whether the label "policy maker" or "confidential" fits a particular position but whether the employer can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved. *Branti*, 445 U.S., 518. Applying this standard, the Court found that although the Public

Defender's Office implements public policy and has access to confidential information, these had no bearing on partisan political concerns. Thus, the *Elrod-Branti* analysis calls for a balancing process between the employee's First Amendment rights and the governmental interest for political loyalty to effectively carry out the electorate mandate. The government has the burden of establishing that the public employees' First Amendment rights must yield because political affiliation is an appropriate requirement to fulfill this governmental interest. This burden is not light. In *Elrod*, the Court cautioned that cases of doubt must be resolved in favor of the particular employee asserting the constitutional violation. *Elrod*, 427 U.S., at 368.

In order to reach a determination in this case we must first consider the nature of the institution where Mrs. De Choudens works. The Government Development Bank of Puerto Rico was created by Law 17 of September 23, 1948, 7 L.P.R.A. Sections 551, *et seq*. It is a public corporation that is governed by a seven-member Board of Directors appointed by the Governor of Puerto Rico. Its general purpose is to develop the industrialization of Puerto Rico. Its functions are to serve as fiscal agent and financial advisor to the central government, its agencies, municipalities, public corporations and to the Governor of Puerto Rico and as depository and trustee of central government funds. It also lends money to government agencies, private entities, banks and trust companies. It may invest in bonds, borrow money, lend securities to banks and trust companies and acquire property. See: 7 L.P.R.A. Section 552. The bank is divided into three main operational areas: the Finance Area, the Investment, Treasury and Public Financing Area and the Private Financing Area. The main function of the area headed by plaintiff until April 16, 1985, the Finance Area, is the offering of accounting services to the other areas and dependencies of the Bank. The Finance Area keeps accounting records on the Bank's operations and the servicing of government agencies' accounts with the Bank. It also acts as advisor on accounting matters to government agencies. The Finance Area includes: the Controller Division which maintains and updates all the Bank's internal systems and procedures to ensure that there are adequate internal controls

acceptable to outside examiners; the Budgeting and Control Division[4] which examines all of the Bank's proposed disbursements to ensure that they are made in accordance with the approving authority; the Fiduciary Unit[5] which monitors the payment of the central government of Puerto Rico's public debt and maintains accounting records for the central government's sinking fund; the Accounting Division which maintains accounting records of the public and private sector loans and prepares monthly and annual statements; The Current Accounts Division[6] which is in charge of the Secretary of the Treasury of Puerto Rico's account and the payment of all central government checks issued by that department and other agencies; the Government Accounts Service Division which complements the Currents Account Division in serving all government accounts; and the date processing activities which include three divisions responsible for all the computerized data services. As head of the Finance Area, plaintiff was in charge of planning, coordinating, directing and supervising all of these divisions. The Vice-President of Finance is also a member of the Loan Committee of the Bank and she may act as interim President. Plaintiff testified that she gave advice to the President and the Board of Directors on financial matters within her area.

Defendants have discussed in their post-hearing memorandum the various functions pertaining to the position held by plaintiff to conclude that "the position of Director, Area of Finances of the Government Development Bank, is clearly a policymaking-confidential position for which political affiliation is an appropriate requirement." This conclusion is erroneous from a legal and factual viewpoint. Defendants' distorted view of the Supreme Court's holding in *Branti* underlies their entire analysis. At pages 44 and 45 of their brief they insist that "[p]olicymaking and confidentiality connected to *public policy* are the traditional criteria for determining whether party affiliation is an appropriate requirement for the effective performance

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[4] This division also prepares and monitors the Bank's annual budget.

[5] This unit also makes interests and principal payments, as they become due, to holders of Puerto Rico bonds.

[6] The division also performs the requisite duties as setting agency for the Puerto Rico Clearing House Association.

of a public office" and that the conclusion of the *Branti* Court "turned on the degree to which the position of Assistant Public Defender involved policymaking and confidentiality connected to *public policy*." (Emphasis ours.) This twisted reasoning leads defendants to make the circular argument that all that is needed to fulfill the political affiliation requirement of *Branti* is to show that the policy making functions of an employee be connected to public policy. *Branti* made clear that policymaking is not equivalant, in all circumstances, to partisan political concerns. In the first place, *Branti* does not mention that policymaking be connected to public policy. In its evaluation of whether a particular position involved a political element it considered, in all its examples, whether the policymaking and access to confidential information by the particular employee was related to *partisan political interests*, not to public policy as defendants assert in their memorandum. Justice Stevens expressly noted that "[u]nder some circumstances a position may be appropriately considered political even though it is neither confidential nor policymaking in character" and that "[i]t is equally clear that party affiliation is not necessarily relevant to every policymaking or confidential position." *Branti*, 445 U.S., at 518. Defendants have deliberately ignored this clear message and chosen to mislead. We have no quarrel with their contention that Mrs. De Choudens is a policymaker and has access to confidential information within the bank. However they have utterly failed to establish that such policymaking and confidential information has any bearing, as required by *Branti*, on partisan political concerns. They rely heavily on the fact that she has broad discretion to implement and discharge her duties and that she provides valuable advice to higher bank officials but never connect how these attributes of a policymaker are related in this case to partisan political interests.[7] They also rely on the argument that somehow being of the same political persuasion as her superiors would result in a more efficient and smoother performance of Bank operations, in view

[7] Defendants have cited a number of Seventh Circuit cases that follow *Nekolny v. Painter*, 653 F.2d 1164. The test adopted by the Seventh Circuit does not provide helpful guidelines if we are to be faithful to the Supreme Court's holding in *Branti*.

of the importance of her former area which is the division that provides support services to the rest of the Bank. This argument was expressly rejected in *Elrod*, 427 U.S., 364-366. Even defendants' own witnesses, including Dr. Oyola, did not consider that partisan political interests are involved here. Gustavo Doble and Sarah Rodríguez, bank officers who have served for years, both recognized that the position formerly occupied by plaintiff does not require partisan affiliation. Referring to positions of confidence, Dr. Oyola himself observed:

"A People of positions of confidence should be chosen on two criteria. One of them is competence, the other one is having the same policy as the person whom they are going to serve.

Q By saying policy, you mean the same political faith?

A No, the same policy directions.

Q How do you determine those, you mean to tell me you inquire into somebody's mind and say this person believes in socialism, therefore I don't him working in the bank?

A No, sir, I mean for example a clear policy direction that was given to me was to create a Development Bank out of the GDB, that is a major policy direction, policy decision and that I have to carry out, and that I trust persons below me that will also carry out that function.

Q Did you believe any of them would or would not obey you because of their political affiliation?

A No." Transcript at pages 584-585.

Finally, although defendants have not articulated the possible partisan policymaking attributes of the Bank in view of its functions as advisor and fiscal agent to the government we have considered this possibility. The Government Development Bank requires, like any other institution whose main goal is to attain

economic success, a continuity in its organization and structure, as well as financial stability and strength. In fact, "[t]he members of the Board are appointed to four-year staggered terms to ensure continuity in policy orientation and in the conduct of Bank operations." 1984 Annual Report of the Government Development Bank of Puerto Rico, page 7, exhibit C for the defendants. See 7 L.P.R.A. Section 552, Article 5th of the Bank's charter. To subject this financial institution to the influence peddling and cronyism that patronage brings will erode its very foundation. The area which plaintiff previously directed is precisely that part of the institution entrusted with safeguarding its banking operations in the strict sense of the word. The Finance Area is essentially a provider of accounting services and technical, financial information to give other areas of the Bank the necessary input to make their decisions. Whatever characteristics of plaintiff's former position could arguably be related to a partisan political interest are so insubstantial when considered in the context of her overall functions that they do not out weigh her First Amendment right to political affiliation. There are less drastic and intrusive ways of achieving whatever partisan political interests that the Bank may legitimately attempt to accomplish than by violating plaintiff's constitutional rights. See *Jiménez-Fuentes*, Slip Op. at page 7. ("Defendants must use less draconian methods to cure improprieties.") In sum, defendants have failed to meet the burden imposed upon them, as the hiring authority, by the *Branti* standard of establishing that political affiliation is an appropriate requirement of this position.

Since plaintiff has definitely proven likelihood of success and since this case involves First Amendment rights which must be protected against encroachment by public office holders we find that injunctive relief must be GRANTED. *Elrod*, 427 U.S., 373-374. Observance of constitutional rights is essential to their preservation. Without immediate restitution, there will neither be clear observance nor preservation of constitutional rights.

This opinion and order shall serve as the Court's findings of fact and conclusions of law in support of the injunctive decree to be entered.

SO ORDERED.

At San Juan, Puerto Rico, on February 4, 1986.

CARMEN CONSUELO CEREZO
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

ZAIDA LYDIA DE CHOUDENS, and the conjugal partnership composed of DE CHOUDENS, ZAIDA LYDIA and MARRERO, MIGUEL A. Plaintiffs	*	
vs	*	
THE GOVERNMENT DEVELOPMENT BANK OF PUERTO RICO; OYOLA, JOSE RAMON, individually and in his representative capacity as PRESIDENT OF THE GOVERNMENT DEVELOPMENT BANK OF PUERTO RICO; AGOSTO-ALICEA, JUAN, individually and in his representative capacity as CHAIRMAN OF THE BOARD OF DIRECTORS OF [THE GOVERNMENT DEVELOPMENT BANK OF] THE COMMONWEALTH OF PUERTO RICO; DE-JESUS-TORO, FRANCISCO; COLORADO, ANTONIO J.; VELEZ-LEBRON, RUBEN; GARCIA-MENDEZ, MANUEL; ROVIRA, EDUARDO and SUAREZ, DIEGO each individually and each in his representative capacity as DIRECTOR OF THE GOVERNMENT DEVELOPMENT BANK OF PUERTO RICO Defendants	*	CIVIL 85-1187CC

PRELIMINARY INJUNCTIVE DECREE

For the reasons stated in the Opinion and Order issued on this date the defendants THE GOVERNMENT DEVELOPMENT BANK OF PUERTO RICO; OYOLA, JOSE RAMON, individually and in his representative capacity as PRESIDENT OF THE GOVERNMENT DEVELOPMENT BANK OF PUERTO RICO; AGOSTO-ALICEA, JUAN, individually and in his representative capacity as CHAIRMAN OF THE BOARD OF DIRECTORS OF [THE GOVERNMENT DEVELOPMENT BANK OF] THE COMMONWEALTH OF PUERTO RICO; DE-JESUS-TORO, FRANCISCO; COLORADO, ANTONIO J.; VELEZ-LEBRON, RUBEN; GARCIA-MENDEZ, MANUEL; ROVIRA, EDUARDO and SUAREZ, DIEGO each individually and each in his representative capacity as DIRECTOR OF THE GOVERNMENT DEVELOPMENT BANK OF PUERTO RICO are hereby ORDERED to immediately reinstate Zayda [sic] Lydia de Choudens to her former position as Senior Vice President of the Finance Area of the Government Development Bank, with the same salary she was receiving prior to her demotion on April 16, 1985 and with the same duties, pending the outcome of this case.

SO ORDERED.

At San Juan, Puerto Rico, on December 27, 1985.

CARMEN CONSUELO CEREZO
United States District Judge

APPENDIX E

United States Court of Appeals
For the First Circuit

No. 85-1655

ARNALDO JIMENEZ FUENTES, ET AL.,
Plaintiffs, Appellees,
v.
HONORABLE JAIME TORRES GAZTAMBIDE, ET AL.,
Defendants, Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO
[Hon. Raymond L. Acosta, *U. S. District Judge*]

Before
Campbell, *Chief Judge*,

Aldrich, Coffin, Bownes, Breyer and Torruella,
Circuit Judges

September 19, 1986

OPINION EN BANC

COFFIN, *Circuit Judge*. Plaintiffs-appellees, Arnaldo Jimenez Fuentes and Jose Vicente Vazquez, claim that they were transferred from their government positions for political reasons in violation of the first and fourteenth amendments. After a lengthy hearing, the United States District Court for the District of Puerto Rico issued a preliminary injunction, ordering their reinstatement. A panel of this court denied a stay, granted an expedited appeal, and affirmed the order of the district court. After the panel denied rehearing, this court vacated the panel's opinion, setting the case for rehearing *en banc*. In light of full briefing and oral argument, and a review of the district court hearing and the relevant case law, we reverse the issuance of a preliminary injunction.[1]

I

Plaintiffs Jimenez Fuentes and Vicente Vazquez are members and active participants of the Partido Nuevo Progresista (PNP), the ruling party in Puerto Rico from 1977 to 1985. They were two of the eleven Regional Directors of the Puerto Rico Urban Development and Housing Corporation (CRUV — Corporacion de Renovacion Urbana y Vivienda). CRUV is a public corporation, 17 L.P.R.A. §§ 21-25 (1984), attached to the Department of Housing of the Commonwealth of Puerto Rico, 3 L.P.R.A, §441(e) (1982). As Regional Directors, plaintiffs worked in the Program of Public Housing, the principal division of CRUV.

In November 1984, the Partido Popular Democratico (PPD) defeated the PNP in the gubernatorial election, and assumed power in January 1985. Defendants-appellants, Jaime Torres Gaztambide (Secretary of the Department of Housing of Puerto Rico) and Quevedo del Rio (Executive Director of CRUV), both PPD members, were appointed within two months. In March 1985, they transferred plaintiffs from the positions of Regional Director to the plaintiffs' previously-held positions at CRUV.

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[1] In a companion case, *DeChoudens* v. *Government Development Bank of Puerto Rico*, No. 86-1059, slip op. (1st Cir. Sept. 18, 1986), we affirm a district court's issuance of a preliminary injunction reinstating the Vice President of the Finance Area in the Government Development Bank

II.

At the outset we note the burden plaintiffs faced in order to gain a preliminary injunction:

> "In the First Circuit, a plaintiff must satisfy four criteria in order to be entitled to a preliminary injunction. The Court must find: (1) that plaintiff will suffer irreparable injury if the injunction is not granted; (2) that such injury outweighs any harm which granting injunctive relief would inflict on the defendant; (3) *that plaintiff has exhibited a likelihood of success on the merits*; and (4) that the public interest will not be adversely affected by the granting of the injunction."

Planned Parenthood League of Massachusetts v. *Bellotti*, 641 F.2d 1006, 1009 (1st Cir. 1981) (quoting *Women's Community Health Center, Inc.* v. *Cohen*, 477 F. Supp. 542, 544 (D. Me. 1979) (citations omitted)) (emphasis added).

For purposes of appellate review, the issue is whether "the issuance of the injunction, in light of the applicable standard, constituted an abuse of discretion." *National Tank Truck Carriers, Inc.* v. *Burke*, 608 F.2d 819, 823 (1st Cir. 1979) (quoting *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922 (1975)). The constitutionality of the demotions was not before the district court and is not presently before us because there has been no trial on the merits. "The only question properly before the Court is whether or not a preliminary injunction should have been issued to reinstate plaintiffs to their positions as Regional Directors. *See Thornburgh* v. *American College of Obstetricians and Gynecologists*, 54 U.S.L.W. 4618, 4636 (U.S. June 11, 1986) (O'Connor, J. dissenting). We emphasize that because we hear this matter on appeal from a grant of a preliminary injunction, our "conclusions" and "holdings" as to the merits of the issue presented are to be understood as statements as to probable outcomes. *Planned Parenthood*, 641 F.2d at 1009. "We eliminate repeated reference to this fact at each relevant juncture of this lengthy opinion for purposes of brevity and simplicity." *Id.*

III.

Defendants claim that the district court abused its discretion in finding that the plaintiffs had shown a likelihood of success on the merits. To support this argument, they challenge three independent findings by the district court: one, that plaintiffs were transferred for political reasons; two, that the positions of Regional Directors were not positions for which political affiliation was appropriate; and three, that plaintiffs would not have been transferred but for their political affiliation. Defendants correctly point out that if any of the findings were an abuse of discretion, we must reverse the issuance of the preliminary injunction.

A.

We cannot say that the district court abused its discretion in finding that the plaintiffs were transferred for political reasons. See *Rosaly* v. *Ignacio*, 593 F.2d 145, 149 (1st Cir. 1979) (whether protected conduct was a substantial or motivating factor in decision to discharge plaintiff). The court found that the proximity in time between the defendants' appointment and the plaintiffs' transfer indicated an underlying political motive, especially in light of the unrefuted evidence that plaintiffs were active PNP members.[2] Although defendant Quevedo del Rio testified that he did not know the plaintiffs' political affiliation when he dismissed them, the district court did not believe this statement, in part because of Quevedo's admission that a Regional Director, to be effective, must be a member of the PPD. In response to the defendants' assertion that plaintiffs were transferred because of their incompetency, the district court found that at no time prior to their removal were plaintiffs ever apprised of any such allegation. Additionally, plaintiffs had never been admonished or disciplined for their work. whether or not we would have reached the same conclusion as to this issue, we cannot say that the district court abused its discretion.

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[2] Jimenez Fuentes served as the political auditor for the PNP mayor of Juncos, assisting the mayor generally in his campaign. Vicente Vazquez was the PNP Coordinator of the Electoral Unit and Secretary of the Association of Pro-Statehood Engineers, as well as the campaign director for a Commonwealth Senator, Chito Ojeda.

B.

We now address the dispositive issue — whether political affiliation is an appropriate requirement for the position of CRUV Regional Director.

1. *Survey of the Authorities*

In *Elrod* v. *Burns*, 427 U.S. 347 (1976), the Supreme Court held that public employees who alleged they were discharged because of their political affiliation stated a claim for violation of their first and fourteenth amendment rights.[3] Writing for a plurality, Justice Brennan determined that a dismissal based on an employee's failure to support a political party clearly infringes First Amendment freedoms of belief and association. *Elrod*, 427 U.S. at 359-60. The conditioning of public employment on political affiliation could survive constitutional challenge only if it furthered a vital governmental interest[4] by a means least restrictive of first amendment freedoms. *Id.* at 362-63. The plurality found that a *valid interest* was to ensure that "representative government not be undercut by tactics obstructing the implementation of policies of the new administration, policies presumably sanctioned by the electorate." *Id.* at 367. But a patronage system involving the wholesale dismissal of public employees for partisan reasons, applied without regard to an employee's responsibilities, was not the least restrictive means of serving that interest. The plurality thus concluded that "[l]imiting patronage dismissals to policymaking positions is sufficient to achieve this governmental end." *Id.* at 366.

Apart from noting that it is not always easy to determine when a particular position is policymaking, *id.* at 367, the plurality opinion provides little guidance for lower courts because it did not apply the new legal standard to the particular positions in

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[3] Plaintiffs in *Elrod* were employees of the Cook County Sheriff's Office, including the chief deputy of the process division, the bailiff, and a process server.

[4] The plurality cautioned that "care must be taken not to confuse the interests of partisan organizations with governmental interests," 427 U.S. at 362, to which it added, "[o]nly the latter will suffice," *id.*

question. It did, however, suggest that employees who act as advisers, who formulate plans for implementing broad goals, or whose responsibilities are either not well-defined or of broad scope are more likely to function as policymakers. 427 U.S. at 367-68.

Justice Stewart's concurring opinion in *Elrod*, necessary for the 5-3 decision,[5] narrowed the scope of the plurality's protection formulation. His opinion concludes that confidential, as well as policymaking, employees can be discharged because of their political beliefs. *See id.* at 375.

Subsequently, in *Branti* v. *Finkel*, 445 U.S. 507 (1980), the Court, with Justice Stevens writing for a majority, departed from the policymaking and confidential labels espoused in *Elrod*. It first recognized that the labels were underinclusive, because "a position may be appropriately considered political even though it is neither confidential nor policymaking in character." *Id.* at 518.[6] More importantly, the Court found that the labels were overinclusive, because party affiliation is not a relevant consideration for all policymaking or confidential positions. *Id.* The Court distinguished between policymaking positions related to "partisan political interests [or concerns]," *id.* at 519, which would be vulnerable to discharge, and positions having no bearing on such concerns, which would be protected by the First Amendment.[7] As an example of the latter, the Court discussed the position of a state university football coach, which is policymaking, but for

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[5] The concurring opinion was joined by Justice Blackmun.

[6] As an example, Justice Stevens described the position of an election judge, where state election laws require that precincts be supervised by two judges of different parties. *Id.*

[7] Although *Branti*'s requirement that a position relate to "partisan" concerns at first seems at odds with the use of that term in *Elrod*, the two are consistent. The plurality opinion in *Elrod* states that political firing can only be justified by governmental interests, not the interests of partisan *organizations*. The Court in *Branti* reaffirms that conclusion, but, in finding *Elrod*'s policymaking and confidential labels overinclusive, determined that the positions must relate to "partisan political concerns." Thus, *Elrod* and *Branti* hold that political firing is consitutional when it serves the interests of the government, not a party organization; it serves a governmental interest when used for policymakers or confidential employees whose work involves issues where there is room for political disagreement on goals or their implementation.

which it cannot seriously be argued that "Republicans make better coaches than Democrats...no matter which party" controls state government. *Id.* at 518.

Branti thus frames the "ultimate question" as "whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." 445 U.S. at 518. That an employee is in a policy-making or confidential position[8] remains relevant to the ultimate inquiry, but it is no longer dispositive. *See Meeks* v. *Grimes*, 779 F.2d 417, 420 (7th Cir. 1985). After making these observations, the Court applied the new legal standard to the position in question. It determined that the functions of an assistant public defender, though policymaking, related to "the needs of individual clients and not to any partisan political interests." 445 U.S. at 519. Likewise, although public defenders shared confidential information arising out of their various attorney-client relationships, the Court found that such confidentiality did not have any bearing on "partisan political concerns." *Id.*

To the skeletal teachings of *Elrod* and *Branti* have been added a considerable body of case law from circuit courts of appeal and district courts. This seems a helpful corpus because of the variety of governmental positions considered, the additional inquiries made (consistent with the objective charted by the Court), and the

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[8] In addition to policymaking and confidential positions, the *Branti* Court added the position of a spokesperson:

> "[T]he Governor of a State may appropriately believe that the official duties of various assistants who help him write speeches, explain his views to the press, or communicate with the legislature cannot be performed effectively unless those persons share his political beliefs and party commitments." 445 U.S. at 518.

Consistent with this statement, the Third Circuit in *Brown* v. *Trench*, 787 F.2d 167 (3d Cir. 1986), analyzed the propriety of firing, for political reasons, an employee responsible for writing press releases, speeches, communicating with legislators, and presenting the views of the county commissioners to the press and public on a daily basis. Although some of the employee's duties were clerical, and her writings were based on information from other departments and were never released until reviewed both by her supervisor and the Commissioners, the court found political affiliation to be appropriate because of the employee's role as a spokesperson. 787 F.2d at 170.

overall coherence and consistency of these lower court decisions. We accordingly report our survey of this body of law.

The courts have found employees in the following positions to be subject to removal based on their political affiliation: Assistant Director of Public Information for county, *see Brown* v. *Trench*, 787 F.2d 167 (3d Cir. 1986); First Deputy Commissioner of the Department of Water, *see Tomczak* v. *City of Chicago*, 765 F.2d 633 (7th Cir. 1985); Superintendent of Employment for Chicago Park District, *see Shakman* v. *Democratic Organization of Cook County*, 722 F.2d 1307 (7th Cir. 1983); assistant district attorney, *see Livas* v. *Petka*, 711 F.2d 798 (7th Cir. 1983); *Mummau* v. *Ranck*, 687 F.2d 9 (3d Cir. 1982) (per curiam); fee agent, *see Sweeney* v. *Bond*, 669 F.2d 542 (8th Cir. 1982); city solicitor and assistant solicitor, *see Ness* v. *Marshall*, 660 F.2d 517 (3d Cir. 1981); Senior Citizens' Coordinator, *see Nekolny* v. *Painter*, 653 F.2d 1164 (7th cir. 1981); Deputy Parks Commissioner, *see Ecker* v. *Cohalan*, 542 F. Supp. 896 (E.D.N.Y. 1982); state director of the Farmers Home Administration, *see Committee to Protect the First Amendment Rights of Employees of the Department of Agriculture* v. *Bergland*, 626 F.2d 875 (D.C. Cir. 1979) (pre-*Branti*); *Brunton* v. *United States*, 518 F. Supp. 223 (S.D. Ohio 1981).

Employees in the following positions were found not subject to dismissal under *Elrod* and *Branti*: city court bailiffs, *see Meeks* v. *Grimes*, 779 F.2d 417 (7th Cir. 1985) (remanding for further findings); road-graders, *see Horton* v. *Taylor*, 767 F.2d 471 (8th Cir. 1985); bookkeeper, *see Grossart* v. *Dinaso*, 758 F.2d 1221 (7th Cir. 1985); deputy court clerks, *see Barnes* v. *Bosley*, 745 F.2d 501 (8th Cir. 1984); deputy sheriff, *see Jones* v. *Dodson*, 727 F.2d 1329 (4th Cir. 1984); *Barrett* v. *Thomas*, 649 F.2d 1193 (5th Cir. 1981); supervisor of county branch of the Auditor's office, *see DeLaCruz* v. *Pruitt*, 590 F. Supp. 1296 (N.D. Ind. 1984); city clerk, *see Visser* v. *Magnarelli*, 530 F. Supp. 1163 (N.D.N.Y. 1982).

2. *The Guidelines of Analysis*

From this review of the case law we draw the following propositions. The fundamental one, supporting the limited exemption from First Amendment protection against politically-motivated discharge, is that representative government needs a certain amount of leeway for partisan selection of agents in order to work. These agents may be policymakers, confidential employees, or others for whom party affiliation is an equally "appropriate" requirement. Appropriateness is, we think, a corollary to our system of determining the direction of governmental entities by the popular election of top office holders who have taken or are considered to have taken positions on one or more issues during a campaign. In order for the new administration to be given an opportunity to fulfill expectations, it must have available and also appear to have available significant facilitators of policy, people who have the personal and partisan loyalty, initiative, and enthusiasm that can make the difference between the acclaimed success of a government agency or program and its failure or, more typically, its lackluster performance. The presence of such persons advances the goals of representative government; their absence, in *Elrod*'s term, "undercut[s]" such government. 427 U.S. at 367.

Identifying generic categories of positions where partisan selection and rejection are permissible has, as we have seen, proven to be an elusive and intractable task. But as courts have addressed the task, they have shed light on useful approaches. A threshold inquiry, which derives from *Branti*, involves examining whether the position at issue, no matter how policy-influencing or confidential it may be, relates to "partisan political interests . . . . [or] concerns." 445 U.S. at 519. That is, does the position involve government decisionmaking on issues where there is room for political disagreement on goals or their implementation? Otherwise stated, do party goals or programs affect the direction, pace, or quality of governance?

If this first inquiry is satisfied, the next step is to examine the particular responsibilities of the position to determine whether it resembles a policymaker, a privy to confidential information, a

communicator, or some other office holder whose function is such that party affiliation is an equally appropriate requirement. We would note that in conducting this inquiry, courts focus on the powers inherent in a given office, as opposed to the functions performed by a particular occupant of that office. *Tomczak*, 765 F.2d at 640; *Ness*, 660 F.2d at 522; *Alfaro de Quevedo* v. *De Jesus Schuck*, 556 F.2d 591, 593 n.4 (1st Cir. 1977). "The relevant inquiry is to the function of the public office in question and not the actual past duties of the particular employee involved." *Brown*, 787 F.2d at 168. "Thus, if an officeholder performs fewer or less important functions than usually attend his position, he may still be exempt from the prohibition against political terminations if his position inherently encompasses tasks that make his political affiliation an appropriate requirement for effective performance." *Tomczak*, 765 F.2d at 641.

With this perspective in mind, a court's function, it seems to us, is to do what courts are often called upon to do — to weigh all relevant factors and make a common sense judgment in light of the fundamental purpose to be served. The analogies that come to mine are the following determinations: whether an employee is a supervisor and therefore not a proper member of a bargaining unit, *see Fall River Savings Bank* v. *NLRB*, 649 F.2d 50 (1st Cir. 1981); whether an individual is an independent contractor or an agent, *see Penthouse International, Ltd.* v. *Barnes*, No. 85-6023, slip op. (9th Cir. June 24, 1986); and whether, in a suit under the Federal Torts Claims Act, an official performs discretionary or ministerial duties, *see Ricci* v. *Key Bancshares of Maine, Inc.*, 768 F.2d 456 (1st Cir. 1985). In determining whether a particular position is policymaking, we are guided by Judge Weinstein's catalogue of relevant factors:

> "Whether any particular non-elective position in government serves this function of responding relatively directly to the voters requires some practical sense for the political-governmental system in operation. Among the indicia that locate a job along the spectrum between policymaker and clerk are: relative pay, technical competence, power to control others, authority to speak in the name of policymakers,

> public perception, influence on programs, contact with elected officials and responsiveness to partisan politics and political leaders."

Ecker v. *Cohalan*, 542 F. Supp. 896, 901 (E.D.N.Y. 1982). To this we would add the factor of "responsibilities that are not well defined or are of broad scope." 427 U.S. at 368.

3. *Analysis of the Position of Regional Director of CRUV*

Our first inquiry, then, is whether the position relates to partisan political interests or concerns. At this stage of the proceedings, we conclude that it does. The Regional Director is an employee of CRUV, one of several divisions that carry out the policies of the Department of Housing. CRUV's objective is to improve the living conditions of low and middle income families in urban areas. Among other goals, it attempts to reduce inadequate housing, meet the demand for new housing, encourage private industry's participation in the provision of housing, improve urban communities that lack adequate facilities, and promote the community's participation in the housing area. Its customers include almost 300,000 families. There are several areas within CRUV, the principal division being the Program of Public Housing, which employs 3,300 persons in eleven regional offices throughout Puerto Rico, approximately 90% of all CRUV employees.

Although CRUV's objective is to assist in the provision of housing to *all* low and middle income urban residents regardless of political persuasion, the subject-matter of the division's work is still of a political nature in the context of the Court's opinion in *Branti*. We think this point is well-illustrated by *Tomczak* v. *City of Chicago*, 765 F.2d 633 (7th Cir. 1985), where the Seventh Circuit reversed the district court's judgment that the plaintiff, the First Deputy Commissioner of the Department of Water, was protected from partisan termination. The district court had found that the plaintiff's "only area of decisionmaking authority, while broad within that area, related solely to the mundane decisions

concerning the repair and rehabilitation of [Chicago's] water systems." *Id.* at 641. Finding that the goal of the Water Department was to provide service to all residents without regard to politics, the district court concluded that political affiliation was not an appropriate requirement for the position of First Deputy Commissioner. *Id.*

The Seventh Circuit disagreed, characterizing the district court's analysis as "an unduly myopic view of the role of politics in the seemingly apolitical context of universal provision of services." *Id.* The court stated that the "primary function of any local governmental entity is the provision of services" and that "[e]lections often turn on the success or failure of the incumbent to provide these services." *Id.* Even though plaintiff's position concerned the provision of water to *all* citizens, the court found that his responsibility in that position made political affiliation an appropriate requirement.

Similarly, the provision of housing to low and middle income city residents is a vital political issue, at least as important to partisan program goals as the provision of water discussed in *Tomczak*.[9] A specific illustration of the link between public housing and political philosophies was provided at the hearing by defendants' expert witness, Dr. Jack Hirsbrunner, who conducted a study of the CRUV and concluded that political affiliation was an appropriate criterion for the position of Regional Director. He testified that the ideological differences between the PNP, which

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[9] We are aware that the Puerto Rico Supreme Court, in *Colon* v. *CRUV*, 84 J.T.S. 52 (P.R. 1984), decided that the position of District Manager (similar to Regional Director) at CRUV was not one for which political affiliation was an appropriate requirement. It seems to have based its decision on the fact that the provision of housing was an apolitical task. The Court stated that it did not believe the efficient discharge of the duties of a Regional Director of a public housing program required a "given loyalty to the ideological axioms of a political party. Such a preference is not necessarily a valid criteria [sic] for being either the person entrusted with implementing that social program's policies, or the recipient of such benefits." *Id.* at 19.

We respectfully disagree. We do not frame the inquiry in terms of whether a position requires loyalty with a party's "ideological axioms," but instead, whether the position related to partisan political interests and concerns. As we explain in this section of the opinion, we find the threshold inquiry satisfied in this case.

favors statehood for Puerto Rico, and the PPD, which favors autonomy, give rise to conflicting approaches to the programs and functions of CRUV. An ideological conflict, he believed, would hinder an administration's program. For example, one party favors the government taking an active role in administering properties while the other prefers that private industry assume these functions; additionally, he stated that one party desires the utilization of federal funds, while the other supports the use of local funds.

We therfore hold that, at this juncture at least, the position satisfies the first inquiry.

Our second inquiry involves the inherent powers and privileges of the position of Regional Director. There are eleven Regional directors in all of Puerto Rico, serving under an Executive Director and an Associate Director. Under them serve some 3000 of the 3600 CRUV employees. The position's job description, as to which there was no disagreement at the hearing, contains twenty distinct duties. We deem the job description sufficiently important to include it as an Appendix to this opinion.

For purposes of analysis we have classified the duties into five groups, only one of which, the last, is neutral on the question of whether the position of Regional Director more closely resembles a policymaking/confidential official than a clerk. The other four clearly show that the Regional Director proposes, establishes, and implements public policy, is privy to confidential information, and acts as a spokesperson for the agency. What follows, then, is the list of job duties, organized by us into categories, with the original number of each duty retained.

1. *Policy-making Functions*

1. Directs, plans and supervises operational activities of the Region.
3. Monitors compliance with Commonwealth and federal regulations.
14. Discusses the Regional's operational problems with the Associate Director.

15. Recommends improvement in program to Executive Director.
19. Prepares and controls the Region's budget.
20. Performs any assigned task.

2. *Representative Functions*

4. Conducts periodic meetings on regulations, work guidelines, etc. with supervisory personnel.
6. Attends meetings, as agency representative, with other government officers and civic leaders to coordinate government services offered to public-housing residents.
12. Meets with residents and general public to resolve problem cases.
16. Meets with residents and organized groups to coordinate social activities.

3. *Spokesperson Functions*

8. Drafts correspondence for the Executive Director and Associate Director.

4. *Personnel Duties*

9. Supervises and evaluates Region's section supervisors.
10. Recommends recruitment, dismissals, promotions, salary increases, and other matters for Region's employees.
11. Recruits "necessary irregular personnel."
17. Organizes training of Region's employees.

5. *Ministerial Duties*

2. Reviews and signs reports to central office, HUD, and other agencies.
5. Reviews and signs reports on rent changes, purchase orders, disbursements, and budgets sent to other agencies.
7. Drafts reports on work performed.
13. Visits the Region's housing projects.
18. Receives telephone calls involving Region's operations.

In addition, plaintiff Jimenez Fuentes' own testimony at the hearing suggests his role as a policymaker:

> "As regional directors we deal — we have the responsibility of dealing with the debts at the public housing project. When I arrived in Caguas to direct the region, the problem of the debt was a very serious and extremely serious problem... I was sent to Caguas because...they had to send to Caguas someone who knew the region and who could do the work of a regional director.... Since I had knowledge of the problems of the debt in Caguas we immediately took corrective steps to fix the situation in Caguas."[10]

Likewise, plaintiff Vicente Vazquez testified that when he began as Regional Director, he was told that he "had to be tough and aggressive in order to straighten out this region." He stated that it had been "a challenge...to take control of the San Juan One Region and to lead it to be one of the best ones."

That the Regional Directors do not have final decision-making authority is not determinative of our inquiry. *Nekolny*, 653 F.2d at 1170. They are not like the successful plaintiff in *Barrett* v. *Thomas*, 649 F.2d 1193 (5th Cir. 1981), only one of several hundred deputies to a policymaking official. Rather, they are sole directors of an entire region, each supervising approximately three hundred employees. The Regional Director is, in effect, the alter ego of the Executive Director at the regional level. It is through the relationship with the Regional Directors

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[10] Jimenez Fuentes also testified that:

"The problem of the debt is not something that can be analyzed merely through a report regarding the debt. It's a much more complicated problem. And you have to see what are the attitudes and the jobs performed by the administrators who are the ones who deal directly with the problem of the debt....You have to analyze personnel, the attitude of the personnel, the money available in the budget for the maintenance. That is, there are specifically three areas which are very important, they are the rent collection, maintenance, and community work. ...If you don't work effectively with them, the attitude of personnel, the number of administrators you have, the budget, all those details.... We were able to organize a working team which greatly decreased the debt in that project.

that the Executive Director maintains effective control of the implementation of the housing programs.

Other courts that have analyzed the nature of the responsibilities of state directors of an agency or program have also found that such employees perform sufficiently important roles in government to make political affiliation an appropriate requirement. The District of Columbia Circuit, in a pre-*Branti* opinion, determined that state directors of the Farmers Home Administration exercised considerable control over the implementation of agricultural program policies at the state and local level such that they could be discharged for political reasons. *Committee to Protect the First Amendment Rights of Employees of the Department of Agriculture* v. *Bergland*, 626 F.2d 875 (D.C. Cir. 1979). The court found that even through the United States Civil Service Commission classified these positions as not confidential or policy-making positions, holders of those positions could insure the success or failure of the program. *Id*. at 879. As the court stated:

> "[P]ersons administering huge Federal government programs for an entire state will have a high policy component to their activities, both because such large scale exercise of power usually implicates substantive internal policy, and because such positions are a natural source for influential recommendations of changes in policy. Each state director supervises a staff of nearly 100 statewide and acts as 'the administration's pipeline and advocate at the state and the local level.'" *Id*.

In *Tomczak* v. *City of Chicago*, 765 F.2d 633 (7th Cir. 1985), the plaintiff argued that he was not a policymaker because he performed purely ministerial functions. the Seventh Circuit rejected that assertion, finding that he occupied the second highest job in a large city department, including the administration of a bureau with 1,150 employees and a large annual budget. *Id*. at 641-42. The court concluded that plaintiff was in a position where "his political affiliation could affect the ability of a new administration to implement new policies." *Id*. at 642. Relevant to our

case, the court found that, "even though ultimate decisionmaking authority in most areas rested with the Commissioner [and not the plaintiff], plaintiff had substantial input into those decisions" and his "duties were not strictly circumscribed and ...required something substantially more than simple ministerial competence." *Id.* (citation omitted).

Likewise, in *Brunton* v. *United States*, 518 F. Supp. 223 (S.D. Ohio 1981), the district court did not grant a preliminary injunction to state directors of the Farmers Home Administration because it found that such positions met the *Elrod-Branti* exception. The court found that:

> "each State Director is a vital cog in the machinery of a new Administration's formulation and implementation of national farm and rural development policies. More than any other person in the agency, the State Director is in the critical position of insuring either the success or failure of these national policies through the administration of [Farmers Home Administration] programs within his state area. It is certainly expected that these positions would be filled by individuals who will openly support and aggressively implement the policies of the in-party in the discharge of their duties." *Id.* at 239.

Consistent with these opinions, we find that the Regional Director acts as the Executive Director's representative at the regional level. They "develop, plan, coordinate, revise, and monitor the progress of the agency's programs and thus gauge the success of the Administration's [Commonwealth] policies." *See id.* Without the Regional Directors' political sympathy and loyal cooperation, the Executive Director "might face a situation where the hostile efforts or foot-dragging actions of any one of the [eleven Regional Directors] could singlehandedly thwart the Administration's goals in that particular [region]." *See id.* As Justice Powell noted in his dissenting opinion in *Branti*, "if government is to work, policy implementation is just as important as policymaking." 445 U.S. at 530.

We think it also of note that the Regional Directors fall within the small category of "confidential" employees under the Puerto

Rico Public Service Personnel Act of 1975, 3 L.P.R.A. §1301 (1978). The Act establishes a civil service personnel system in which all Puerto Rico government employees are classified into two categories. *Id.* §1349. Confidential employees, who are of "free selection and removal," are those who "intervene or collaborate substantially in the formulation of the public policy, who advise directly or render direct services to the head of the agency, such as...Regional directors of agencies." *Id.* §§1350 & 1350 (4). The larger category is that of career employees, who are selected strictly on merit and can be removed only for cause. *Id.* §§1331-1338.[11]

Although we do not believe a legislature's classification system is determinative of the *Elrod-Branti* question, we do think it is entitled to some deference. *See e.g.*, *Ness* v. *Marshall*, 660 F.2d 517 (3d Cir. 1981). Thus, we think it significant that Regional Directors are among the few positions treated as policymaking with the Commonwealth's personnel system. The Act generally limits the number of confidential positions to twenty-five per agency, *id.* §1351 (3), and only twelve employees from the Program of Public Housing were so designated. Eleven of the twelve were Regional Directors. With the agency at least, plaintiffs were considered to be at the policymaking end of the spectrum.[12]

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[11] When appointed to confidential positions, career employees retain their right to career positions. If removed from their confidential positions, they must be reinstated to their previously-held career positions, as occurred in this case.

[12] The district court found, as a result of the testimony of Jorge Guillermety, former Associate Director of Public Housing, that "there is little discretion involved in the position of Regional Director." Guillermety, who was dismissed by the PPD and has since instituted his own suit for reinstatement, testified that political affiliation is not a requisite for the position of Regional Director because anyone with an Engineering, Public Administration or Social Services degree can qualify for the position, and because the functions of the job are clearly and specifically set forth in the rules of the Agency. That anyone with a particular masters degree could qualify for a position seems to us to have little, if any, bearing on the question of whether political affiliation is appropriate. Moreover, that the functions of the job are clearly set forth does not mean that little discretion is involved in the job. In fact, those functions reveal a great deal of discretion.

At this stage of the proceedings, we think plaintiffs' position of Regional Director of CRUV is one for which, under *Elrod* and *Branti* and the case law of the lower courts, "party affiliation is an appropriate requirement for the effective performance" of the office. 445 U.S. at 518. In light of this conclusion, we need not decide whether the district court erred in finding that the plaintiffs would not have been fired but for their party affiliation.

V.

As a final matter, we note that the district court did not explicitly reach a contrary conclusion about the partisan nature of the position of Regional Director. Rather, it seems to have based its decision primarily on the fact that it had not been convinced that termination based on political affiliation is justified when the administration could invoke the "simple expediency of disciplining or removing an employee who fails to abide by an Executive Order which reflects the program of the Administration regardless of the employee's political affiliation."[13]

By requiring a government employer to terminate an unprotected employee only upon cause, the district court ignored the teachings of *Elrod*. In *Elrod*, the plurality scrutinized two government interests that were offered in defense of the patronage practice. The first interest was the "need to insure effective government and the efficiency of public employees." The defendants argued that employees not belonging to the party of the administration would lack the incentive to work hard and might be motivated to subvert the administration's efforts to govern effectively. 427 U.S. at 364. The plurality rejected this interest because, *inter alia*, less drastic means than political termination exist for serving this interest. "Specifically, employees may always be discharged for good cause, such as insubordination or poor job performance, when those bases in fact exist." *Id*. at 366.

[13] We note that this is the same approach taken by the Puerto Rico Supreme Court. In *Colon* v. *CRUV* 84 J.T.S. 52 (P.R. 1984), the Court suggested that the plaintiff, although his functions were confidential in nature," could be removed only if he "turn[ed] his back on the requirements of his functions as a public servant." *Id*. at 21.

In contrast, the second articulated interest — the need for political loyalty so that the administration can carry out policies sanctioned by the electorate — was found valid by the plurality, as it might be applied to policymaking positions. In *Branti*, as we know, the Court subordinated resort to the policymaking and confidential labels to a more functional analysis. 445 U.S. at 518. When, therefore, a partisan termination is defended on this ground, there is no requirement that the employer wait for cause to dismiss an employee of a different party; rather, to insure that representative government not be undercut, these employees may be dismissed without cause. Otherwise, indeed, the *Elrod-Branti* exception would have no reason for being. The district court seemingly ignored this implication, accepting the expert's testimony that political affiliation may be appropriate but deciding that the interest could be served by dismissing employees when the employee acts in a manner obstructive of the administration.

We therefore hold that the district court abused its discretion in finding that the plaintiffs had shown a likelihood of success on the merits of their wrongful termination claim.

The grant of the preliminary injunction is reversed.

Appendix

Job Description for Regional Director

"1. Directs, plans and supervises the operational and administrative activities of the Region, such as: Accounting, Personnel and Occupation, Maintenance, Modernization, Community Labor, Management and Section 8.

2. Reviews and signs the reports submitted to the Central Office, HUD and other related agencies.

3. See [sic] to it that the norms and regulations are complied with in accordance to the philosophy of the Public Housing Administration and the HUD Federal Agency.

4. Arranges periodic meetings with supervisory personnel to counsel and inform as to changes in norms and regulations and/or new work guidlins [sic] and other matters.

5. Reviews, approves and signs the reports on rent changes, which are sent to the Federal Agency, Central Office of the Housing Department and other agencies; reports on Accounting purchase orders, disbursements, functional budgets of the Region and preliminary budget of maintenance works and others.

6. Attends, representing the Agency, to meetings with other government officers or civic leaders from the community in order to discuss and coordiate the implementation of Social Services, economics, health and other type of services offered topublic housing residents and programs of the Housing Department.

7. Drafts reports related to the work performed.

8. Drafts correspondence for the signature of the Associate Director and/or CRUV Executive Director.

9. Supervises and evaluates the Supervisors of the different sections attached to the Region.

10. Makes recommendations on personnel recruitment, dismissals, promotions, salary increases and other relations with the Region's employees.

11. Recruits necessary irregular personnel at the Region.

12. Receives and hears residents or general public in problematic cases which have not been solved at a lower level.

13. Performs periodic visits to the housing projects at the Region.

14. Attends periodic meetings with the Associate Director, to discuss problems related to the operations of the Region.

15. Offers recommendations to the Executive Director to improve the services rendered by the Program.

16. Arranges meetings with residents and/or organized groups in the community for the coordination of social activities.

17. Plans and organizes training for the Region's employees in coordination with the Training Committee.

18. Receives telephone calls to give or receive information related to the Region's operations.

19. Is responsible for the preparation and control of the functional budget of the Region.

20. Performs any task as assigned."

"Concurring follows"

ALDRICH, *Senior Circuit Judge, concurring*. As the writer of the panel opinion which is now reversed, I am not at all personally unhappy with this result. I can believe, too, that quite possibly we were too strict, so far as the present plaintiffs are concerned.

At the same time, with great respect to my brethren, I cannot but wonder if some parts of the present opinion read more like the, admittedly provocative, *Branti* dissent than the majority opinion. It is of course true that a change of party at the polls may be stimulated by "lackluster" performance, but this is the age-old excuse — or reason — for patronage. The proper balance is elusive. I worry about the court's broad, and I suggest, unnecessary, generalizations about "lackluster," and its complement "tough and aggressive." These are personal attitudes, far beyond party. Any employee outside of civil service can be discharged for lackadaisical performance. To what extent are there to be classifications where non-party membership is the equivalent?

I am particularly doubtful about invoking the Puerto Rico Personnel Act. Since I believe my court would be quick to

say that, from the constitutional standpoint, this act goes too far, how is it persuasive in some individual case though not in others? And, finally, is not the court overinclusive in categorizing "a privy to confidential information"? All sorts of low level employees may be mechanically privy. Surely ability to keep confidences should not be determined by party affiliation.

With the customary freedom of a judge speaking for himself to express his personal mind, I could hope that the Supreme Court might see fit to liberalize its *Branti* views, but, again with respect, I wonder, in the meantime, if my court's guidance may not have preceded it. In particular I agree with my brother Torruella's aspersions against the Seventh Circuit's decision in *Tomczak* v. *City of Chicago*, 765 F.2d 633 (7th Cir. 1985).

"Dissenting follows"

TORRUELLA, *Circuit Judge* (Dissenting). Although I realize that the majority's task in attempting to define when political affiliation is "appropriate" to a governmental task is not an easy one, I suggest that this burden has not been lightened by its refusal to give due weight to the most relevant reference available in this particular case. *See Colón* v. *CRUV*, 84 J.T.S. 52 (P.R. 1984).

Undoubtedly influenced by the inflated assertions of appellants regarding an alleged egregious volume of political discharge cases pending before the United States District Court for the District of Puerto Rico, the majority has been induced into granted *en banc* consideration with a view to laying down an all-encompassing rule that will easily resolve these controversies. Unfortunately, the subject of this special attention is a case which both procedurally and factually does not lend itself to such facile disposition. The majority's statement that the "'conclusions' and 'holdings' as to the merits of the issue presented are to be understood [only] as statements as to probable outcomes," *ante*, at 4, further emphasizes the inappropriateness of using this juncture for the purpose of laying down a pronouncement by an *en banc* court. More importantly, if this is a "tentative" holding,

the strained result is additional proof that it contributes little to providing concrete guidelines for future action by the district courts or by governmental administrators.

Although the opinion appeals to "common sense judgment," *ante*, at 14, I fail to see how a dispassionate observer can conclude that such a standard was applied herein if we consider that the *majority opinion reaches an opposite conclusion, regarding the same job classification and description, as was reached by three other judicial bodies, e.g.*, the Supreme Court of Puerto Rico, *Colón* v. *CRUV*, *supra*, the United States District Court for the District of Puerto Rico, and a panel of judges of *this* Court (opinion issued December 20, 1985). I do not believe that the present court has a higher claim to common sense than the three judicial bodies that preceded us in deciding this issue. Thus, the majority opinion not only fails to provide cogent guidelines for future action, but completely unsettles what little law was available to direct the district courts in this delicate area. Furthermore, the observance by the public of such a divergence of results can only cause an erosion of its confidence in the judicial process. *See* Pound, *The Causes of Popular Dissatisfaction With the Administration of Justice*, 20 Journal of the American Judicature Society 170, 183-185 (1936-37) (reprinting of an address delivered by Roscoe Pound in 1906 at the annual convention of the American Bar Association).

When all is said and done, the majority simply does not accept the holding in *Branti* v. *Finkel*, 445 U.S. 507 (1980). That case places a *heavy* burden on the side claiming "that party affiliation is an appropriate requirement for the effective performance of the public office involved":

> [U]nless the government can demonstrate 'an overriding interest...of vital importance' requiring that a person's private beliefs conform to those of the hiring authority, his beliefs cannot be the sole basis for depriving him of continued employment.

Id. at 516. This is not a new rule, the Court in *Elrod* v. *Burns*, 427 U.S. 347, 362, 368 (1975), having indicated that "the

[governmental] interest advanced must be paramount," and that "cases of doubt [should be] resolved in favor of the [employee]." *See also Buckley* v. *Valeo*, 424 U.S. 1, 94 (1976). This high standard is overcome in the present appeal by reliance on the flimsiest of evidence and on *Branti*-discarded labels.

Notwithstanding *Branti's* stricture that "the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position," *id*. at 518, much of the majority's analysis continues to rely on such tokens. *Ante*, at 18-19 ("policymaking"), 22,23 ("confidential"), 24 ("policymaker," "confidential"). Even assuming *arguendo* the present-day relevance of these labels, the opinion's deference to Puerto Rico's Legislature in classifying the disputed position within those titles, *ante*, at 24, is particularly disconcerting considering its failure to grant equal treatment to the Supreme Court of Puerto Rico's interpretation of its law. *Ante*, at 17 n.9. *See Posadas de Puerto Rico* v. *Tourism Co. of Puerto Rico*, U.S. , 54 U.S.L. W. 4956, 4959 (July 1, 1986) (in deciding a First Amendment violation claim, the restrictive interpretation given by the Supreme Court of Puerto Rico to a local statute is entitled to "[a] rigid rule of deference...given the unique cultural and legal history of Puerto Rico." *Id*. n.6).

This case also sets bench marks in other respects. We now have "experts" in the field of "appropriateness of political affiliation." Although I would not have thought that this is a matter within the reach of Rule 702, Fed. R. Evid., I will, also *arguendo*, overlook this apparent technicality. It would seem, however, that such factual conclusions as were testified to by Dr. Hirshbrunner are nevertheless subject to the strictures of Rule 52(a) of the Civil Rules, which advises against the setting aside of a trial court's findings of fact, even in "granting interlocutory injunction[s]...[,] unless clearly erroneous." Rule 52(a), Fed. R. Civ. P. As stated by the original panel majority in this case in upholding the district court's findings, "By this time we need not dwell on the principle that the district court's findings of fact must stand unless clearly wrong." *Jimenez Fuentes* v. *Torres Gaztambide*, slip op. (Aldrich, J., December 20, 1985), at p. 4. Notwithstanding the clarity of this statement of principle, in view of the majority's actions I am obliged to remind it of the

additional wisdom provided by *Anderson* v. *City of Bessemer City, N.C.*, U.S. , 105 S. Ct. 1504, 1511-1513 (1985), also a discrimination case, in which the Supreme Court stated:

> [A] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty under Rule 52 if it undertakes to duplicate the role of the lower court... If the district court's account of the evidence is plausible in light of the record reviewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. *Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous*. This is so even when the district court's findings do not rest on credibility determination, but are based instead on physical or documentary evidence or inferences from other facts. ... Rule 52 'does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's finding unless clearly erroneous'.
>
> ...But when a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding if not internally inconsistently can virtually never be clear error.

Citations omitted, emphasis supplied.

The majority violates virtually every prescription in *Anderson*. Unless the original panel of this court was completely

misguided, I can state with some assertion that the evidence presented to the district court permits at least two plausible views of the evidence.

It is self-evident that the trial court rejected the "expert's" "opinion" on this matter, as well it might have in view of the facetious nature of this testimony. The "expert's " statement that there are ideological differences between Puerto Rico's two leading parties regarding the acceptance or non-acceptance of federal funds for public housing, *ante*, at 17, would lead any trier of fact sitting in Puerto Rico to question the reliability of such an assertion. *See* Junta de Planificación de Puerto Rico, *Informe Económico al Gobernador, 1984-85*, San Juan, Puerto Rico (1986), Tabla 19, "Transfers between Puerto Rico and the Federal Government... Fiscal Years 1972-85," p. A-19, column entitled "Rent subsidies."

The "expert's" conclusions regarding the need for political affiliation of the job description in question are equally incredulous. The Supreme Court of Puerto Rico, in considering this same position, with an almost identical job description, put it this way:

> It would be difficult to visualize that the faithful and efficient discharge of the duties of Director or General District Supervisor, as listed in OP-16 of the Personnel Office, in the public housing program, would require a determined loyalty to the ideological postulates of a given political party.

Colón, *supra*, at 3628. (My translation). I believe we would be on safe grounds to assume that Puerto Rico's Supreme Court is better qualified to reach this conclusion than appellant's "expert."

Yet, the majority avoids specifically ruling that the district court was clearly erroneous in not giving credibility to the "expert's" tailormade testimony. Of course, if we conclude that the issue of "appropriateness" is a legal one, then the district court had no business in even hearing Dr. Hirshbrunner's opinion, and we, even less in relying upon it as a basis for today's far reaching decision.

Although much is made of the ranking of the regional director's position within CRUV, the majority overlooks the real standing of that position in the hierarchy of the Department of Housing, the umbrella organization within which CRUV is but one of three divisions. Joint Exhibits I and II, reproduced as appendices to this dissent, establish that "regional director" is a bombastic title for a *fifth echeleon* government supervisor (their previous title), with *limited territorial and agency jurisdiction*. These, at least, are two distinguishing features from *Tomczak* v. *City of Chicago*, 765 F.2d 633 (7th Cir. 1985), in which the politically-discharged employee occupied the second highest job in a city-wide department. Other cases relied upon by the majority, *ante*, at 21-23, involve employees with agency-wide or statewide authority. The very testimony of plaintiffs Jiménez-Fuentes and Vicente Vázquez, cited as proof their "role as...policymaker[s]," *ante*, at 19-20, is in fact demonstrative of exactly the opposite: they were sent and told to do a job in a region, *i.e*, all they did was follow orders and policy established higher up.

Reliance on *Tomczak* in my opinion is not advisable. In addition to the factual distinctions already alluded to, I believe that a holding, which makes the dispensation of water a job in which political affiliation is an "appropriate" requirement for its effective performance, is a highly suspect ruling. I should point out that we shall be the first court outside the Seventh Circuit to even cite *Tomczak*.

Nor do I agree with the majority's labeling or analysis of the job description in this case as leading to a "common sense" conclusion that political loyalty is appropriate to a regional director's job. *Ante*, at 18-19. Important and relevant portions of that description have been overlooked. *See* Appendix, *ante*, at 28-30. For example, from paragraph 1 of those functions labelled "policy-making" by the majority, *ante*, at 18, is excluded the fact that the functions therein described merely deal with activities "such as: Accounting, Personnel and Occupation, Maintenance, Modernization, Community Labor, Management and Section 8." *Ante*, at 28. From the next paragraph included by the majority within that label, Paragraph 3, have been omitted those parts

dealing with the standard to be applied by the regional directors in monitoring compliance: "the philosophy of the Public Housing Administration and the HUD Federal Agency." *Ante*, p. 28. If we equate "philosophy" with "policy," the conclusion cannot be avoided but that a regional director *follows*, rather than establishes, public policy. The *discussion* of his region's operational problem with the associate director (No. 14), the *offering of recommendations* on improvement of the services to the Executive Director (No. 15), and the preparation and control of his Region's *functional* budget (No. 19), can only be labelled "policymaking" by a more expanded view of that term than has hereto been prevalent.[1] Requirement No. 15, "[p]erforms any task as assigned," is, if anything, illustrative of the subservient status of regional directors rather than an indication of their "policymaking" prerogatives.

I do not believe that it is necessary or productive to continue an indefinite discussion of the majority's analysis of the job description. A brief reading of the duties classified under the various headings ("Representative Functions," "Spokesperson Functions," "Personnel Duties," "Ministerial Duties"), *ante*, p. 19, reveals that these activities are similar to those carried out by a myriad of low and middle level government executives. If the performance of these functions are sufficient excuse for abrogation of their First Amendment rights under *Branti*, then this Court is opening the flood gates for the swinging of the patronage axe. This will be a judicial throwback to the days of the spoils system, when someone in a position like the regional directors, because they were party hacks responding to selfish partisan interests, could condition the granting of public aid to "appropriate" party affiliation by the recipient. This decision will hardly be a contribution by this court to good government to say nothing of the chilling effect that it will have on the exercise of the associational rights of the thousands of government employees who must now fear its impact.

---

[1] *See Elrod* v. *Burns*, 427 U.S. 347, 368 (1976):

> In determining whether an employee occupies a policymaking position, consideration should also be given to whether the employee acts as an advisor or formulates plans for the implementation of *broad* goals.

(Emphasis supplied).

This is an unfortunate decision. It is the wrong case, the wrong juncture in that case, and the wrong outcome. *Branti*, *supra*; *Anderson*, *supra*.

Politiae legibus non leges politiis adaptandae.

I dissent.

APPENDIX F

PUERTO RICO PUBLIC SERVICE PERSONNEL ACT SECTIONS 5.9 TO 5.11, AS AMENDED, 3 L.P.R.A. 1349 TO 1351

3 L.P.R.A. § 1349. Services and categories

There shall be two services: career and confidential; therefore there shall be career employees and confidential employees. The Director shall issue the general standards that will govern the confidential service personnel administration throughout the Personnel System.

3 L.P.R.A. § 1350. Confidential employees

Confidential employees are those who intervene or collaborate substantially in the formulation of the public policy, who advise directly or render direct services to the head of the agency, such as:

(1) Officers appointed by the Governor, their personal secretaries and drivers; as well as their executive and administrative assistants who answer directly to them.

(2) Heads of agencies, their personal secretaries and drivers; as well as their executive and administrative assistants who answer directly to them.

(3) Assistant heads of agencies and their personal secretaries and drivers.

(4) Regional directors of agencies.

(5) Personal secretaries and drivers of officials selected by popular election as well as their assistants who answer directly to them.

(6) Members of boards or standing committees appointed by the Governor and their respective personal secretaries.

(7) Members and personnel of boards or commissions appointed by the Governor having a specific period of effectiveness.

(8) Personnel of the offices of the Puerto Rico Ex-Governors.

Confidential employees shall be of free selection and removal. Likewise confidential shall be those employees who though of free selection may be removed only for good cause by provision of law or those whose appointment is for a term pre-fixed by law.

Every regular employee in a career position who is appointed to a confidential position shall be entitled to be reinstated in a position equal or similar to the last one he held in the career service.

3 L.P.R.A. § 1351. Confidential positions, approval

(1) Each agency shall present for approval of the Office a plan containing the confidential positions by which it desires to operate. In the case of municipalities, the Municipal Assembly shall follow the ordinance or resolution approving the plan submitted by the mayor and shall send it to the Office for the sole purpose of ascertaining that the provisions of section 1350 of this title have been complied with.

(2) The Office shall only intervene to determine if the plan on confidential positions complies with the provisions of section 1350 of this title.

(3) The Office may not approve more than 25 confidential positions for the same agency, except for those that due to their organizational structures, functional complexity or size require a larger number of confidential positions for their efficient operation.

(4) Any agency interested in increasing or reducing the number of confidential positions shall submit the plan to the Office, which shall intervene only for the purposes of seeing that the criteria established by section 1350 of this title are complied with.

APPENDIX G

PERSONNEL REGULATIONS FOR MANAGERIAL EMPLOYEES APPROVED BY THE GOVERNMENT DEVELOPMENT BANK FOR PUERTO RICO, AS AMENDED
(Translation)

ARTICLE #2 - *Categories of Employees*

Managerial officials and employees will be divided between career employees and confidential employees.

Section 2.1 - ...

Section 2.2 - *Confidential Employees*

Confidential employees will include those performing the following kinds of duties:

1. Formulation of public policy. This function will include direct or delegated responsibility for the adoption of directives concerning the contents of the Bank's programs, criteria for eligibility, operations, interagency relationships, and other essential aspects of the direction of the Bank. This function will also include substantial and effective participation in the formulation, modification or interpretation of the above described functions in the administration, or in the rendering of direct advice to the President, through which the employee may effectively influence the directives of the Bank. This segment of the confidential service shall give way to those changes that may be necessary or convenient whenever changes in the political direction may occur.
2. Direct services to the President that require personal trust or confidence to a high degree. The element of personal trust or confidence in this type of service may not be substituted. Duties may include secretarial services, maintaining confidential files, driving automobiles and other similar tasks. In the efficient performance of those services the element of confidentiality and security in relation to persons, programs or public functions is always present.

Section 2.3 - ...

Section 2.4 - *Recruitment and Selection of Confidential Employees*

Confidential employees must comply with such requirements as to preparation and experience and of any other kind that may be considered essential for the adequate performance of their duties. In the case of confidential employees involved in the formulation of public policy, the provisions of these regulations referring to classification of position and recruitment and selection of employees will not be mandatory. For this kind of official there may be developed a concept of classification and recruitment that harmonizes with the requirements of each case.

Employees belonging to the confidential service because of the nature of their personal relationship with the President will be subject to the classification plan, and the President will determine their qualifications to carry on their duties by such tests as he may consider appropriate, but in any case they will be subject to the minimum requirements for the appropriate classification.

Section 2.5 - *Designation of Confidential Positions*

The confidential positions in the Bank shall be the following:

1. The President
2. The Administrative Assistant to the President
3. The President's Advisor on Economic Matters
4. Executive Secretaries in the Office of the President
5. Executive Vice President
6. Executive Secretaries to the Executive Vice President
7. Director, Area of Administration*
8. Executive Secretary to the Director, Area of Administration
9. Legal Counsel
10. Secretary to the Board of Directors in charge of Minutes
11. (there is no number 11)
12. Chief of the Information and Communications Division

---

* This is respondent's position, now called Director, Area of Finance. In 1981 the Area of Administration was reorganized and renamed Area of Finance after the Personnel Division and the Division of Administrative Services were eliminated and set-up as separate divisions. See District Court's Opinion, App., C4. (Note by petitioners.)

13. Auditor
14. Controller
15. Director of the Personnel Division
16. Subdirector of the Personnel Division
17. Director, New York Office
18. Office Manager, New York Office
19. Personal Driver of the Director of the New York Office
20. Director, Area of Fiscal Agency
21. Director, Area of [private] Lending
22. Director of the Economic Studies Department
23. Director of the Operations Department
24. Executive Secretary of Operations Department

Section 2.6 - ...

Section 2.7 - *Reinstatement of Confidential Employees*

1. Confidential employees shall be of free selection and removal by the President.
2. If a confidential employee, previously classified as career employee, is removed from his confidential position, he will be entitled to reinstatement to a position equal or similar to the last occupied by him in the career service.
3. ...
4. ...

Section 2.8 - *Designation of Career Positions*

All positions not included in Section 2.7 [sic] will be career positions.

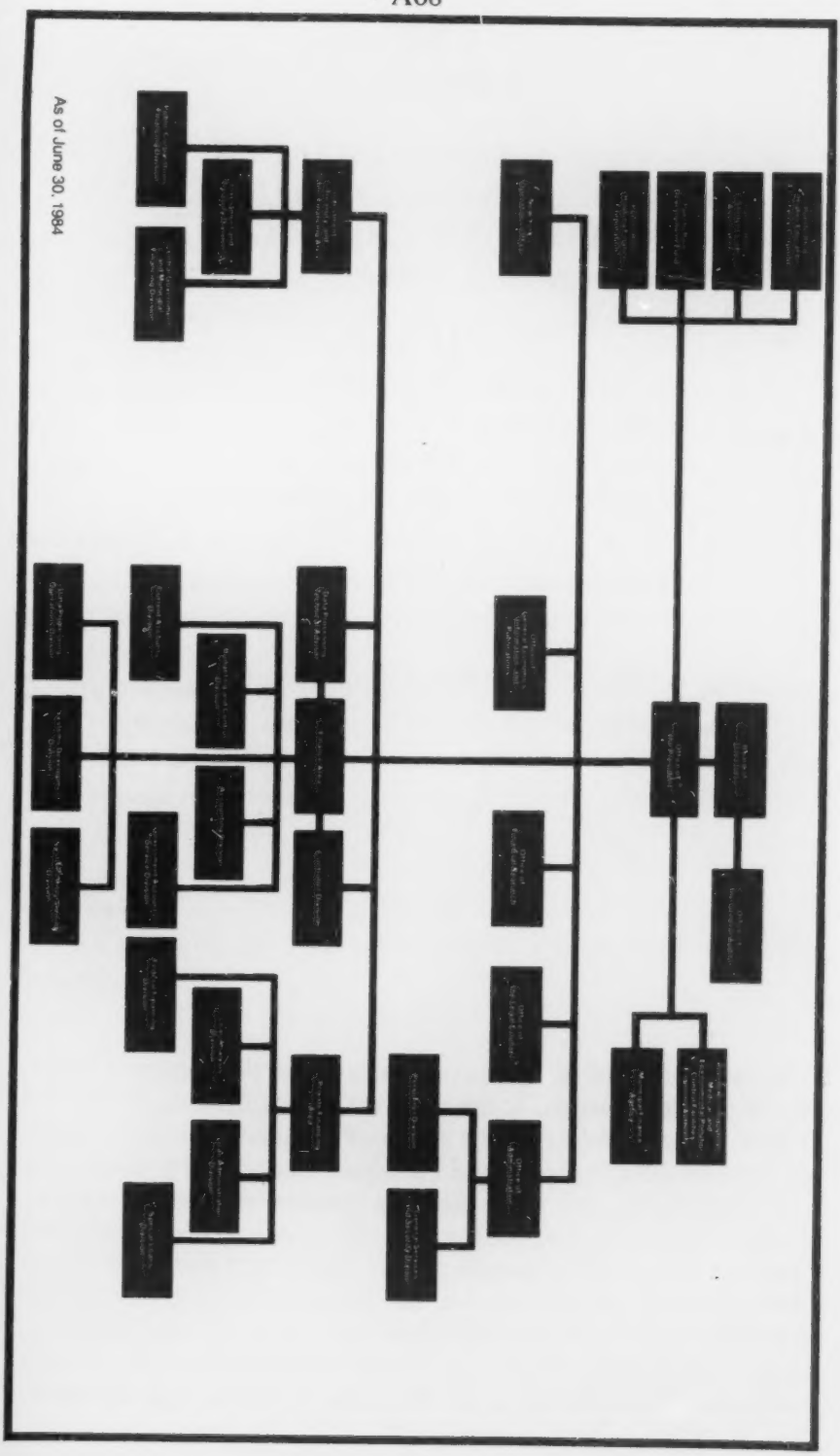
APPENDIX H

ORGANIZATION CHART OF THE GOVERNMENT DEVELOPMENT BANK FOR PUERTO RICO

Appearing at pp. 2 and 3 of the 1984 Annual Report*

[See Organization Chart, p. A68.]

*To the left side of the Board of Directors and the President appear the Bank's subsidiaries. To the right, the Bank's affiliates. Part of the Office of the President are the positions included in his staff, which appear immediately below the President. Under the President, and reporting directly to him are the three operational areas of the Bank: Finance, headed by respondent, Private Financing, and Investment, Treasury and Public Financing. It is undisputed that the Finance Area provides the services and the information necessary for the other two areas' work and decisions. See District Court's Opinion, App. A28. If an Executive Vice President has been appointed, Area heads may report to him or the President. Court of Appeals' Opinion, App. A3. (Note by petitioners).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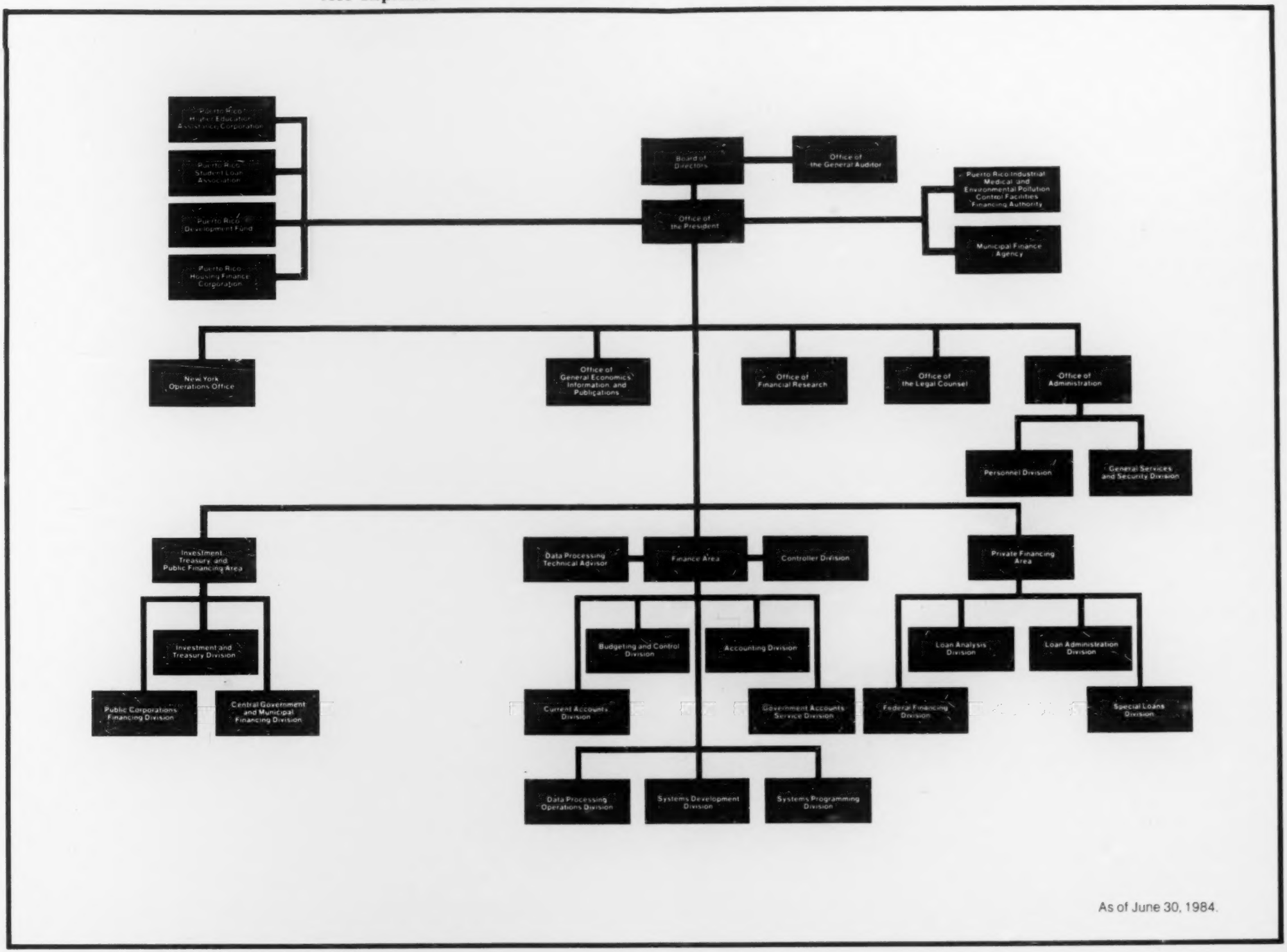

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86-1022

NO. 86-

Supreme Court, U.S.
FILED
MAR 7 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1986

THE GOVERNMENT DEVELOPMENT BANK FOR PUERTO RICO; JOSE RAMON GONZALEZ, INDIVIDUALLY, AND AS PRESIDENT OF THE GOVERNMENT DEVELOPMENT BANK FOR PUERTO RICO; JUAN AGOSTO ALICEA, FRANCISCO DE JESUS TORO, ANTONIO J. COLORADO, RUBEN VELEZ LEBRON, GILDO MASSO, EDUARDO ROVIRA AND DIEGO SUAREZ, EACH INDIVIDUALLY, AND AS MEMBERS OF THE BOARD OF DIRECTORS OF THE GOVERNMENT DEVELOPMENT BANK FOR PUERTO RICO,

Petitioners,

v.

ZAIDA LYDIA DE CHOUDENS,

Respondent.

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

OPPOSITION TO THE GRANT OF PETITION FOR CERTIORARI

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March 4, 1987

PUBLISHING RESOURCES, INC. SAN JUAN, PUERTO RICO

QUESTION PRESENTED

Whether a Senior Vice President, Finance Area of the Government Development Bank for Puerto Rico, whose demotion was found to be politically motivated and impermissible under the *Elrod-Branti* standard justifying the issuance of a preliminary injunction, which was, in turn, affirmed by a unanimous Court of Appeals, justifies this Court's intervention under either its inherent supervisory power or on an alleged, but unsubstantiated, conflict among the Circuits?

PARTIES TO THE PROCEEDINGS BELOW

The Respondent herein and the conjugal partnership of Zaida Lydia De Choudens and Miguel A. Marrero were the plaintiffs before the District Court for the District of Puerto Rico and plaintiffs-appellees before the Court of Appeals for the First Circuit. Respondent is the party in interest as to the relief afforded below. Besides the petitioners, there were two other defendants before the District Court, who were defendants-appellants before the Court of Appeals: José Ramón Oyola, the previous President of the Government Development Bank for Puerto Rico, and Manuel García Méndez, a former member of its Board of Directors. Since they were replaced, respectively, by petitioners José Ramón González and Gildo Massó, they are not affected by the preliminary injunction granted by the District Court and affirmed by the Court of Appeals, although they remain as defendants below for purposes of plaintiffs' untried claim for damages.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS BELOW ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISION INVOLVED 2

COUNTER STATEMENT OF THE CASE BELOW 2

DECISIONS OF THE COURTS BELOW 9

REASONS FOR NOT GRANTING THE WRIT 11

I. THE COURT OF APPEALS PROPERLY APPLIED *BRANTI*. 11

II. THERE ARE NO CONFLICTING APPROACHES AMONG THE SEVERAL COURTS OF APPEALS . 14

CONCLUSION 19

TABLE OF AUTHORITIES

Cases: **Page**

Barnes v. Bosley, 745 F.2d 501 (8th Cir. 1984) 18

Barrett v. Thomas, 649 F.2d 1193 (5th Cir. 1981) 20

Branti v. Finkel, 445 U.S. 507 (1980) ..... *passim*

Brown v. Trench, 787 F.2d 167 (3rd Cir. 1986) 20

Brunton v. United States, 518 F. Supp. 223 (S.D. Ohio 1981) 21

Collazo Rivera v. Torres Gaztambide, No. 86-1308 Slip Opinion 1st Cir., February 25, 1987 14

Colón v. CRUV, 115 D.P.R. 503 (1984) 12

Committee to Protect The First Amendment Rights of Employees of the Department of Agriculture v. Bergland, 626 F.2d 875 (D.C. Cir. 1979) 21

Crisp v. Bond, 536 F. Supp. 137 (W.D. Mo. 1982) 21

De Choudens v. Government Development Bank of Puerto Rico, 801 F.2d 5 (1st Cir. 1986) 14

De La Cruz v. Pruitt, 590 F. Supp. 1296 (N.D. Ind. 1984) App. 2 21

Ecker v. Cohalan, 542 F. Supp. 896 (E.D. NY 1982) 20

Elrod v. Burns, 427 U.S. 347 (1976) ..... *passim*

Gannon v. Daley, 561 F. Supp. 1377 (N.D. Ill. 1983) 21

Gibbons v. Bond, 523 F. Supp. 843 (W.D. Mo. 1981)
aff'd 668 F.2d 967 (8th Cir. 1982) 20

Givhan v. Western Line Consolidated School,
439 U.S. 410 (1979) 11

Grossart v. Dinaso, 758 F.2d 1221 (7th Cir. 1985) 18

Horton v. Taylor, 767 F.2d 471 (8th Cir. 1985) 17

Illinois State Employees Union v. Lewis,
473 F.2d 561 (7th Cir. 1972) 15

Jiménez Fuentes v. Torres Gaztambide,
807 F.2d 236 (1st Cir. 1986), App. 32 ..... 5, 12, 14, 21

Jones v. Dodson, 727 F.2d 1329 (4th Cir. 1984) 19

Keyishian v. Board of Regents, 385 U.S. 589 (1967) 14

Kusper v. Pontikes, 414 U.S. 51 (1973) 14

Meeks v. Grimes, 779 F.2d 417 (7th Cir. 1985) 19

Mt. Healthy City Board of Education v. Doyle,
429 U.S. 274 (1977) 11

Mummau v. Ranck, 531 F. Supp. 402 (E.D. Pa.)
aff'd 687 F.2d 9 (3rd Cir. 1982) 20

Nekolny v. Painter, 653 F.2d 1164 (7th Cir. 1981) 19, 21

Ness v. Marshall, 660 F.2d 517 (3rd Cir. 1981) 20

Perry V. Sindermann, 408 U.S. 593 (1972) 14

Shakman v. Democratic Organization of Cook County,
722 F.2d 1307 (7th Cir. 1983) 20

Tomczak v. City of Chicago,
765 F.2d 633 (7th Cir. 1985) 13, 19, 20, 21

Visser v. Magnarelli, 530 F. Supp. 1165 (N.D. N.Y. 1982) . 21

Constitutional Provisions

United States Constitution

First Amendment 2
Fourteenth Amendment 2

NO. 86-

IN THE

Supreme Court of the United States

October Term, 1986

THE GOVERNMENT DEVELOPMENT BANK FOR PUERTO RICO; JOSE RAMON GONZALEZ, INDIVIDUALLY, AND AS PRESIDENT OF THE GOVERNMENT DEVELOPMENT BANK FOR PUERTO RICO; JUAN AGOSTO ALICEA, FRANCISCO DE JESUS TORO, ANTONIO J. COLORADO, RUBEN VELEZ LEBRON, GILDO MASSO, EDUARDO ROVIRA AND DIEGO SUAREZ, EACH INDIVIDUALLY, AND AS MEMBERS OF THE BOARD OF DIRECTORS OF THE GOVERNMENT DEVELOPMENT BANK FOR PUERTO RICO,

Petitioners,

v.

ZAIDA LYDIA DE CHOUDENS,

Respondent.

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

OPPOSITION TO THE GRANT OF PETITION FOR CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 801 F.2d 5 (1st Cir. 1986). That decision must be read in conjunction with *Jiménez Fuentes* v. *Torres Gaztambide*, 807 F.2d (1st Cir. 1986). The opinion of the District Court, not yet reported, appears together with the other cases in Petitioner's Appendix.

JURISDICTION

Jurisdiction was properly invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the Constitution of the United States provides that:

> "Congress shall make no law abridging the freedom of speech...or the right of the people peacefully to assumble...".

The First Amendment applies to the Commonwealth of Puerto Rico either directly or through the Fourteenth Amendment.

COUNTER STATEMENT OF THE CASE

The issue in this case is whether a member of the Popular Democratic Party, regardless of experience, makes a better operations manager of a Bank (Senior, Vice President, Area of Finance), than does a member of the New Progressive Party, with more than twenty (20) years of banking experience in every facet of the Bank's operation. Zaida Lydia De Choudens moved step by step from the lowest echelon of the Government Development Bank for Puerto Rico to become Controller. Then, upon the recommendation of a Popular Democrat, Senior Vice President of the Bank, she was named as his successor to the position now

known as Senior Vice President, Area of Finance. (A13-15.) Her job is an important one and she has discretion in implementing orders within the area of her responsibility. She establishes no political policy, though. The goals and utilization of the Government Development Bank are set by the Governor of Puerto Rico and the Legislature. Following the election mandate, a Board of Directors sets the policy of the Bank, even within a narrow range, and there is a more limited range of interpretation by the Bank President, a Gubernatorial nominee. The President, in turn, names an Executive Vice President.

Excluding the New York Office, the subsidiaries and affiliates and the staff support for the President, at the fourth tier of the Bank's hierarchy are the Senior Vice Presidents. The immediate former president of the Bank, Julio Pietrantoni, who was not even of the same political faith as the Governor who appointed him, denied that the Respondent had policymaking power. She had ample decision-making power commensurate with her responsibility, he admitted. This testimony then ensued:

Q: Did this authority, and the ability to make decisions also carry with it the right to make policy for the bank?
A: No, sir.

Q: How is policy at the bank made?
A: I think that a lot of it rests on the president of the bank with a great input from the Board and a much greater input from the leadership of the Administration, at the time, in power.

Q: And what is the policy of the bank and how does it change?
A: Well, the policy of the bank is like, which talk about setting policy, you mean where are we going, what are we going to do with regards to a particular area. I would say that whoever sets the policy is the guy who sets the course, if we were a ship, the guy who decides due north or due south, whoever sets the course, that is the guy that makes the policy. He gets a lot of input from the navigator, or from the lawyers and economists, but he tells everybody else that he

> is setting the course, and everybody else within his own realm - does his work to follow that course.
>
> Now, when the head of the ship or the head of the bank sets the course, he must, he does that, some things on his own, other things with the input of the Board and other things with the input of the Administration. Sometimes he sets the course because he really doesn't set the course, he just tells the director, but somebody else is setting the course with higher decisions that are made by Legislators, by setting up a law that you might be totally opposed to or the Finance Counsel or the Governor, or sets up a policy that the government must follow.
>
> So there, sometimes the President of the bank is not always setting the course, he is just passing on what the legal system of the, or the power system that requires him to do (T27-28).

Respondent made recommendations about improving the work of her area, which were sent through channels to the Board. He flatly stated that political affiliation was not a requirement for that job (T81). Mr. Pietrantoni's predecessor, Mariano Mier, who appointed her to the position from which she was demoted was asked:

Q: Did her political affiliation play any role in your appointment of her?
A: Not in my mind, no.
Q: Why not?
A: Because I considered GDB a very professional institution, I wasn't looking for her political affiliation, I was looking for competence (T484).

Then he was asked:
Q: Did she make many decisions?
A: She was in charge of the administrative area, on that side she made decisions.

Q: Did she make any policy for the bank?
A: No (T484).

Mr. Mier also testified that he knew that Mrs. De Choudens' predecessor was a member of the Popular Democratic Party and he had delegated to him all the authority that Mrs. De Choudens had. At no time did he ever consider that the predecessor, Mr. Doble, was making Bank policy (T514-18).

The Executive Vice President, who was fired when Respondent, Zaida Lydia De Choudens was demoted, was questioned about why she was named interim President. He replied:

A: Because she was basically the one that was named and given that responsibility, not because of seniority or any other reason. I would suspect, I wasn't the one that took that decision, but she probably had more knowledge of everything that was going on in the bank, than any other specific senior vice president. Meaning that there is a senior vice President in New York, he only knew about what was going on in New York, he didn't know anything about the bank. There was a senior vice president who knew about economy, but he didn't know how to economize the bank. Then there was the senior vice president in charge of the private lending side, he knew about private lending, but didn't get involved in other things. Zaida was the person that had the general knowledge of what was going on in the bank (T105).

He, too, denied that she had a policymaking role (T116). He also flatly denied that political affilition was a requirement for the job and pointed out that most of management was of the opposite political faith immediately before the 1984 elections.

The Respondent testified about her discretion and authority within the areas of her responsibiity and that she was responsible for the input into the bank's operational budget from her area. She made recommendations for improvements, many of which were accepted, others were not. When she was promoted from Control-

ler to Senior Vice President, she recommended that her former job be filled by Sarah Rodríguez, a member of the opposite, Popular Democratic Party, because she thought Sarah to be the person best qualified (T259-60). Her predecessor, Mr. Gustavo Doble, was hired by her as a consultant on two occasions before her demotion, although she well knew that he, too, was a "Popular" (T260). Her successor, the same Sarah Rodríguez, denied that her duties as Senior Vice President of the Area of Finance depended, in any way, upon party affiliation (T325).

Mr. Doble, the Respondent's predecessor recommended the Respondent to be controller because he felt she could do the job (T330) and that the performance of the job was without any regard to political affiliation (T351). Finally, José Ramón Oyola, who was the new President, the one who demoted her, denied that he even knew her political affiliation. He did not think the position of Mrs. De Choudens required any particular political affiliation, but only a similarity of policy views toward accounting systems, but confessed that he didn't have any ideas as to Respondent's views (T597).

Thus, when the Petition speaks about a top-ranking government official like the Respondent, it is an overstatement of the record, albeit the phrase does appear toward the end of the Court of Appeals' opinion. The district Judge, Carmen Cerezo, stated, "We have no quarrel with their [defendants'] contention that Mrs. De Choudens is a policymaker and has access to confidential information within the bank" (A26). That statement must be read in the context of what the Judge found as to the scope of this policy. Those duties were delineated at A25 and the policy was not political policy but the internal policy in her areas of responsibility. When she spoke for the Bank, she expressed the Bank's official point of view, never her own. She was not a creator of the public policy of the Bank. That was the function of the Board and the President within the narrow areas left open by the pronouncements of policy of the Governor and the Legislature.

The opinion of Judge Coffin, speaking for a unanimous Court of Appeals, defined the case of Respondent, as:

> "...[A] staff official who, while indubitably in a policymaking, confidential, and communicative position, is both empowered and constrained by the limits of her specialized functions...." (A7) and,

> "...[W]hile these responsibilities signify a position of substance of valued policy contributions, recommendations, and advice, they involve policially-neutral, technical, and professional matter. Similarly, though plaintiff was indeed an agency spokesperson, there is no suggestion of any 'party line' or political, goal-oriented message that she ever communicated." (A9)

On the record, this case is as simple as that of the high school football coach hypothesized by Mr. Justice Stevens in *Branti v. Finkel*, 445 U.S. 507 (1980). The Respondent was a 20-year employee who had mastered every aspect of the operations of Government Development Bank for Puerto Rico. The Bank had been run as a business. It was staffed with economists, investment specialists, loan specialists, bond specialists and administrators. At the core, is the Area of Finance. It services the Public Loans, the Private Development Loans, provides the computerized accounting, pre-audits the accounts and services the subsidiaries and affiliates. It requires trained specialists and professionals. Never had it been politicized until the post- election period in 1985. Then, for the first time, every identifiable New Progressive Party member not protected by union membership was fired or demoted, including the Executive Vice President, the Senior Vice President in the Loan Area, the Respondent, the Personnel Director, the head of the Janitorial Service, and two secretaries. With the exception of the Executive Director, the reason for the firing of each was "incompetence." Orchestrating

the *Mt. Healthy - Givham*[1] defense, the new Administration called for a return to an unbridled spoils system. In seeking a rejection of the approach by the Court of Appeals for the First Circuit, the Petitioner is asking this Court to scrap the *Elrod-Branti*[2] approach and to replace the First Amendment Right to free association with the concepts of Boss Tweed.

The Decisions in the Courts Below

In the District Court, Judge Cerezo meticulously dissected the evidence of the *Mt. Healthy* defense and concluded that the Respondent was not worthy of credence (A21). He claimed he never knew the Respondent's political affiliation. It is bizarre to face the powerfully mounted claim that Respondent's position was one for which party affiliation is an appropriate requirement. Everyone who testified at the trial, including two former Bank Presidents, the former Executive Vice President, Respondent's predecessor (who today is once gain employed at the Bank as Executive Vice President), Respondent's successor, the Personnel Director who handed Respondent the removal letter, and the Petitioner, all testified that political affiliation is not an appropriate requirement for the effective performance of the public office that Respondent held. The trial judge emphasized that the Government has the burden of establishing that political affiliation is an appropriate requirement. It did not. On the basis of the evidence, the Court need not have gone into such depth in the interpretation of the *Branti* mandate. Judge Cerezo's conclusion was that banking operations were not related to partisan political interests, when the job is essentially a provider of accounting services and technical and financial information. As a question of fact, the Petitioner herein failed to meet his threshold burden.

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[1]*Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977); *Givhan v. Western Line Consolidated School*, 439 U.S. 410 (1979).

[2]*Elrod v. Burns*, 427 U.S. 347 (1976); *Branti v. Finkel*, 445 U.S. 507 (1980).

The Court of Appeals wrote two opinions and they must be considered together. In *Jiménez Fuentes v. Torres Gaztambide*, 807 F.2d 236 (1st Cir. 1986) (A32), the plaintiffs were Regional Directors of CRUV (Corporación de Renovación Urbana y Vivienda)[3]. The Appellate Court left undisturbed the District Judge's findings that plaintiffs in that case were transferred for political reasons, or that plaintiffs would not have been transferred but for their political affiliation. But, the Court differed with the trial judge on whether political affiliation is an appropriate requirement for the job. Under the Commonwealth of Puerto Rico's reading of their own Civil Service Law, based in part on the decision of this Court in *Branti*, the same position was determined to be one for which political affiliation was an inappropriate requirement, *Colón v CRUV*, 115 D.P.R. 503 (1984). It relied on *Branti* and *Elrod*, the test being whether the position was a policymaking one. *Branti* departed from the policymaking and confidential labels because they were either underinclusive or overinclusive. There are positions appropriately considered political that are not policymaking and there are policymaking positions where party affiliation is not a relevant consideration. Eschewing the approach of the Supreme Court of Puerto Rico, the majority opinion of the Court of Appeals synthesized its approach in footnote 7:

> "Although *Branti's* requirement that a position relate to 'partisan concerns' at first seems at odds with the use of that term in *Elrod*, the two are consistent. The plurality opinion in *Elrod* states that the political firing can only be justified by governmental interests, not the interests of partisan *organizations*. The Court in *Branti* reaffirms that conclusion, but, in finding *Elrod*'s policymaking and confidential labels overinclusive determined that the positions must relate to 'partisan political con-

[3]Puerto Rico's Housing and Urban Renewal Corporation.

> cerns.' Thus, *Elrod* and *Branti* hold that political firing is constitutional when it serves the interests of the government, not a party organization; it serves a governmental interest when used for policymakers or confidential employees whose work involves issues where there is room for political disagreement on goals or their implementation." (A37)

The Court of Appeals analyzed the case law since *Branti*, and concluded that identifying generic categories of positions where partisan selection and rejection are permissible has proven to be an illusive and intractable task. Nevertheless, it gleaned from the cases the following proposition:

> "...[D]oes the position involve government decision making on issues where there is room for political disagreement on goals or their implementation? Otherwise stated, do party goals or programs affect the direction, pace, or quality of governance?"

In the case of the CRUV Regional Directors, the Court of Appeals found that the providing of housing to low- and middle-income city residents is a vital political issue. It went on to find that the plaintiffs were *alter egos* at the regional level for the Executive Director of CRUV. The need for political loyalty so that the administration could carry out policies sanctioned by the electorate was found to be inherent in these positions.

Judge Aldrich's concurrence can only be classified as a reluctant one. He joined Judge Torruella in criticizing the reliance upon *Tomczak v. City of Chicago*, 765 F.2d 633 (7th Cir. 1985) and felt that the *Branti* views of the Supreme Court were "liberalized," which we read to mean more accommodating to the governmental agency and not to the constitutional rights of the jobholder. Judge Torruella dissented. He felt that the labels of "policymaker" or "confidential" was given much too much importance in view of the *Branti* strictures. Judge Torruella felt that the majority's opinion abrogated the job-holders rights and

opened the floodgates for the swinging of the patronage axe (A60).

In the decision rendered on the instant case on the same day, *De Choudens v. Government Development Bank of Puerto Rico*, 801 F.2d 5 (1st Cir. 1986), a unanimous *En Banc* Court of Appeals found that the job was not one for which political affiliation was an appropriate requirement because she was constrained by the limits of her specialized functions. (A2) On the record, that conclusion was an imperative. The Court had to cut the snares in which it had enveloped itself in the *Jiménez Fuentes* case by placing so much importance on the policymaking label.

The decisions are harmonious. Most recently, the Court of Appeals revisited this issue in *Collazo Rivera v. Torres Gaztambide*, No. 86-1308, 1st. Cir. decided on February 25, 1987. The same dichotomy persists between Judge Torruella and his brethren concerning what is a proper partisan political concern in Puerto Rico.

REASONS FOR NOT GRANTING THE WRIT

I.

THE COURT OF APPEALS PROPERLY APPLIED *BRANTI*.

If the Court of Appeals for the First Circuit can be faulted in any way, it is for enlarging rather than restricting the exception to the Constitutional requirement that public employees cannot be dismissed from their employment because of their political belief. In *Elrod v. Burns*, 427 U.S. 347 (1976), a plurality of this Court, started with the proposition that, "The right to associate with the political party of one's choice is an integral part of this [First Amendment] basic constitutional freedom. *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973)." Mr. Justice Brennan relied upon the decisions in *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) which held that political association alone could not, consistently with the First Amendment, constitute an adequate ground for denying public employment. He also relied upon *Perry v. Sin-*

dermann, 408 U.S. 593 (1972) which held that the Government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests - especially his interest in free speech...." 408, U.S. at 597.

The plurality opinion emphasized that while the right to public employment was not an absolute, encroachment cannot be justified upon a mere showing of legitimate state interest, but that the interest advanced must be paramount, one of vital importance, and the burden is on the Government to show such an interest. 427 U.S. at 367. Policymaking positions were the only positions that ought to give way to the constitutional imperative. 427 U.S. at 367. This opinion recognized that a policymaker was not an easily definable creature. It spoke about the critical nature of the responsibilities and concluded that in the final analysis, "the political loyalty 'justification is a matter of proof, or at least argument, directed at particular kinds of jobs.' *Illinois State Employees Union v. Lewis*, 473 F.2d at 574 ...the burden of establishing this justification as to any particular Respondent will rest on the petitioner on remand, cases of doubt being resolved in favor of Respondent." 427 U.S. at 368. Mr. Justice Stewart and Mr. Justice Blackman concurred and stated that a non-policymaking, non-confidential Government employee could not be discharged from a job he was satisfactorily performing upon the sole ground of his political beliefs.

If no magic is ascribed to the words "policymaking" or "confidential" and the Government is held to its proof, Respondent's position was described by all as important and responsible but without any aspect of public policymaking. Had *Branti* never been decided, on this record, the result would have been the same. The Government never proved that Respondent had any impact on the formulation of public policy other than for professional and technical advice. When the District Court spoke of her policymaking role, it was within the circumscribed area of her administrative authority.

Branti v. Finkel, 445 U.S. 507 (1980) added a new dimension to the issue. The holding was:

> "In sum, the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate the party affiliation is an appropriate requirement for the effective performance of the public office involved." 445 U.S. at 518.

On this holding, this case required summary affirmance by the Court of Appeals. The record at trial is devoid of any evidence that demonstrates that political affiliation had anything to do with the Respondent's job. She achieved the position solely on the basis of merit and was recommended for the job by her predecessor, a member of the opposite political party. Every person who testified, and that included the incumbent President of the Bank who fired her, two former Presidents, the former Executive Vice President, her predecessor and successor and the incumbent's personnel chief, asserted that the job she performed did not require any political affiliation with the reigning party.

Nothing was so esoteric about this case that required extensive analysis. It was the "policymaking" and "confidential" labels that had piqued the interest of the Court of Appeals. But, after examining the record, the Court of Appeals applied *Branti*, as this court intended.[4] There is no need to even define "policymaker", after *Branti*. The only inquiry is to look at the Government employee's job and to determine whether the hiring authority has met his heavy burden of showing that political affiliation is needed to do that work. Accounting and fiscal administration plus a comprehensive knowledge of the inner workings of the Government Development Bank in the financial community is not a position that is or should be politicized.

For pages in its Petition, Petitioner argues for the restitution of the label to primary position. Not once does it refer to the record,

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[4]When the District Court and Court of Appeals speak of a high-ranking official in describing plaintiff, they must be considering her salary and her responsibility. She is a virtual unknown, and is inactive politically.

the transcript, or the testimony. It shuns the obvious and subsititutes a series of straw men of what might happen if Respondent wanted to sabotage the operations of the Bank. This Court was not persuaded by such arguments in *Elrod* and it is hardly proper to suggest that a loyal Government employee who has served in both Popular Democratic Party and New Progressive Party administrations for more than two decades, and, has never received an evaluation lower than the highest possible one, would frustate public policy. Not one of the assertions made at pages 16-20 is supported by anything in the record. On the contrary, these questions were asked, and the answers were that she would not (and we suggest, could not) frustate public policy.

Her position is not related to partisan political concerns and the record so substantiates that proposition.

II.

THERE ARE NO CONFLICTING "APPROACHES" AMONG THE SEVERAL COURTS OF APPEALS.

The aftermath of *Branti* reveals a case-by-case application of the test of whether the particular job is one which "ought to" include political affiliation as a requisite. We say "ought to", because in most instance the hiring authority would like to create, like here, a new concept of each job and thereby expand the *Elrod-Branti* exception. Without any claims of being exhaustive, a review of the cases cited by the Petitioner and by the Court of Appeals for the First Circuit is illustrative. The first question is whether the issue of whether the job is one for which political affiliation is a reasonable requirement is a factual one or a legal one. Here, the approaches do differ with some courts holding that the dispute may involve a fact issue, others say it involves an ultimate legal question, and others find grey areas between the two extremes. In most cases, the factual determination as to the nature of the specific job will resolve the issue.

Horton v. Taylor, 767 F.2d 471 (8th Cir. 1985) presents a hotly contested issue of whether road-graders in a small rural area of

Arkansas held jobs that encompassed the necessity for party affiliation. Merely stating the issue should cause some degree of shock because it is hard to conceive of a job with less need for party affiliation. Yet, the spoils system was so ingrained that road-graders won and lost their jobs every two years as the political control wavered between one or the other political party. Because the district judge did not find any factual basis for the proposition as to whether the road-graders' jobs required political affiliation, but dismissed the petition on account of a non-existent "small county" exception to the rule, the Court of Appeals for the Eighth Circuit reversed, as a matter of law. It remanded the case for further findings.

In *Grossart v. Dinaso*, 758 F.2d 1221 (7th Cir. 1985) the District judge found that the plaintiff, a bookkeeper, could not be terminated for political reasons, but he concluded that the reasons for her firing were dissatisfaction with her, personally. The Court of Appeals for the Seventh Circuit, ignoring the *Branti* stricture, started with an inquiry as to whether the dismissed employee was a policymaker. It finally agreed she was not. The case is troublesome because as the dissenter, Judge Posner, finds the cause of her firing was most probably politically motivated and impermissible. The unfortunate turn of the case and the exaggerated importance of the labels, notwithstanding, the *Branti* application to the job was appropriate. In the context of the relative political import of their positions, no one can gainsay that Mrs. Grossart's bookkeeper position was more politically influential the Mrs. De Choudens'. The litmus test of *Branti*, together with the high burden imposed on the hiring authority, indicates that neither position appropriately required political affiliation.

Barnes v. Bosley, 745 F.2d 501 (8th Cir. 1984) represents a straightforward affirmance of findings of political firing and an analysis that the jobs were not ones for which political affiliation was appropriate. The only difference between these successful plaintiffs who were assistant court clerks and the instant case is that these clerks originally received their positions as the result of patronage, whereas the Respondent herein competitively obtained her first position, and every subsequent position in the Bank, was earned on the basis of merit.

The Fourth Circuit Court of Appeals found that under the *Branti* test, as a matter of law, the duties of a deputy sheriff, no matter what the size of the office, or the specific position of power involved, or the customary intimacy of associations within the office, or the need for mutual trust and confidence did not involve a position related to partisan political interests. *Jones v. Dodson*, 727 F.2d 1329, 1338 (4th Cir. 1984). The case was remanded for further jury findings with Judge Fairchild dissenting in favor of entry of judgment as in the verdict.

What the Petitioner emphasizes, "footdragging," or "leaks" or "potential for disruption" are not proper inquiries under the *Branti* or *Elrod* tests. Poor or disobedient performance can always be rectified. What we have in the case at bar is an unabashed instance of political firing - a wholesale evacuation of all members of the opposing party not protected by union membership.

After this the Bank made a *post-hoc* attempt to change the job concept into something that had never before existed. In *Meeks v. Grimes*, 779 F.2d 417 (7th Cir. 1985) the Court reversed a decision upholding the firing of bailiffs. In *Tomczak v. City of Chicago*, 765 F.2d 633 (7th Cir. 1985) the Seventh Circuit iterated its earlier view that its formulation of the test in *Nekolny v. Painter*, 653 F.2d 1164 (7th Cir. 1981) cert. denied 455 U.S. 1021 (1982) was proper. In that latter case the Seventh Circuit adopted this formulation: "The test is whether the position held by the individual authorized, either directly or indirectly, meaningful input into government decision-making on issues where there is room for principled disagreement on goals or their implementation." 653 F.2d 15 1170.

Petitioner contends that the Court of Appeals for the First Circuit did not follow that test. That is because the Petitioner semantically extends disagreements on goals to cover all non-partisan as well as politically partisan goals. He would have the Court endorse his power to fire all persons suspected of being non-members of the Popular Democratic Party, if their jobs were as engineers, accountants, word-processors because they have "either directly or indirectly, meaningful input...." That issue was covered in the trial and it became apparent that plaintiff's

input was considerable in the professional and technical sense, but nil insofar as partisan goals were involved. In *Tomczak*, the First Deputy Commissioner of the Water Department was fired for political reasons. The District Court found that the decision-making authority of *Tomczak*, while considerable, was not in areas where there could be principled disagreements about goals or their implementation. The Court of Appeals disagreed. In reversing, it found the position filled with power and authority and with the power to make policy. While paying homage to *Branti*, the Court of Appeals seems to sound more like *Elrod*. *See also, Shakman v. Democratic Organization of Cook County*, 722 F.2d 1307 (7th Cir.) *cert. denied, sub. non Lindsey v Kelly*, 464 U.S. 916 (1983).

As in *Shakman*, a District Court found that the chief deputy commissioner of parks in New York functioned as a full-time political operative and was exempt, *Ecker v. Cohalan*, 542 F. Supp. 896 (E.D. N.Y. 1982). The cases from the Third Circuit were all predictable. City solicitors, assistant prosecutors and speechwriters are all positions for which political affiliation is a must. *See, Ness v. Marshall*, 660 F.2d 517 (3rd Cir. 1981); *Mummau v. Ranck*, 531 F. Supp. 402 (E.D. Pa.) aff'd 687 F.2d 9 (3rd Cir. 1982) (per curiam); *Brown v. Trench*, 787 F.2d. 167 (3rd Cir. 1986). While most of Brown's duties were clerical or technical, her principal duty was to act as a spokesperson for the County Commissioners, and that was one duty which could not be performed except by someone who shared the Commissioners' politically partisan views. The Respondent herein had no comparable obligations.

In every case where the employee was not found subject to dismissal under *Elrod* and *Branti*, the courts weighed the factors and applied a balancing test. The titles for the positions are unimportant because similar titles may fall within the patronage exception if the duties required political affiliation. According to the analysis[5] made in *Brown v. Trench*, the key factor was whether

[5]*Gibbons v. Bond*, 523 F. Supp. 843 (W.D. Mo. 1981) aff'd 668 F.2d 967 (8th Cir. 1982) (branch manager of state Department of Revenue); *Barrett v. Thomas*, 649 F.2d 1193 (5th Cir. 1981), cert. denied 456 U.S. 925 (1982).

the employee has "'meaningful input into decision making concerning the nature and scope of a major township program.' *Nekolny*, 653 F.2d at 1170." In *Visser v. Mangarelli*, 530 F. Supp. 1165 (N.D. N.Y. 1982) the trial judge followed *Branti*, albeit a proponent of the views of the dissent. He was unconvinced that the First Amendment should protect public employees who obtain their positions in the patronage system.

A fortiori, persons who obtained their positions on merit and without regard to patronage, like the Respondent in the case at bar, should have more protection. This, however, is not the test. The test should be as stated in *Branti*, and the District Court did so apply it in *Visser*.

Petitioner contends that the First Circuit has applied criteria different from the decisions in the Seventh Circuit, which he apparently likes. Petitioner is result oriented. The simple truth is that the First Circuit has followed the Seventh's narrow reading of *Branti*. Labels are still important in the approach of both Courts. It is conceded that the First Circuit decided *Jiménez Fuentes* contrary to the way that case would have been decided in the Commonwealth courts. It held that the federal test was not as loose as Puerto Rico's. The "confusion," "widespread problems of interpretation," "judicial doubt" are signal reaction words employed by Petitioner to describe the results. There are cases that seem incongruent if we applied generic terms to the positions and there are cases where reasonable minds will differ, viz the lower court and appellate decisions in *Tomczak*, or the decisions in *Jimenez-Fuentes*, itself[6].

(deputy sheriff); *De La Cruz v. Pruitt*, 590 F. Supp. 1296 (N.D. Ind. 1984) (supervisor of county branch of Auditor's office; *Gannon v. Daley*, 561 F. Supp. 1377 (N.D. Ill. 1983) (administrative assistant to State's Attorney of Cook County); *Crisp v. Bond*, 536 F. Supp. 137 (W.D. Mo. 1982) (assistant director of Division of Motor Vehicles); *Visser v. Magnarelli*, 530 F. Supp. 1165 (N.D. N.Y. 1982) (city clerk).

[6]The importance of the two analogous cases that arose under federal patronage rather than state patronage were very influential in the Court of Appeal's decision: *Committee To Protect the First Amendment Rights of Employees of The Department of Agriculture v. Bergland*, 626 F.2d 875 (D.C. Cir. 1979) (pre *Banti*) and *Brunton v. United States*, 518 F. Supp. 223 (S.D. Ohio 1981).

The decisions, on the whole, are much less protective of the First Amendment rights than one would expect after reading *Branti*. The area of protected patronage is still extremely broad. The Petitioner would broaden the exception to include anyone "who may obstruct the policies of the new administration." It would paint with that broad brush even though it has not one iota of evidence to support that paranoia. Respectfully, a constitutional balancing of rights involves the weighing of measurable factors, not invective.

CONCLUSION

The Court of Appeals and the District Court for the District of Puerto Rico studiously followed this Court's teachings in *Elrod* and *Branti*. A review of the decisions across the country does not reveal any of the alleged widespread problems in applying the *Elrod-Branti* test. Generic classification may be impossible because a deputy sheriff in Oklahoma may hold a completely different kind of position than a deputy sheriff in New Hampshire. There are federal judges who do not like the *Branti* rule and would prefer a different standard. Federal judges do, however, follow *stare decisis*, and do not flaunt the dictates of this Court. Case by case development has shown that *Elrod-Branti* is a workable standard. Each case must rest on its individual record and not the imprecations of counsel. Certiorari is not warranted.

Respectfully submitted.

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